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The South Carolina Dispensary Law has recently come before the Supreme Court of the United States, with a result unfavorable to that enactment. In Scott v. Donald, 17 S. C. Rep. 265, that court holds, among other things incident to the act in question, that the provisions of that law, forbidding the importation of intoxicating liquors by any one except certain State officers appointed under the act, are invalid, as being a restriction on interstate commerce. In the view of the court the act was not intended to prohibit the manufacture, sale and use of intoxicating liquors. On the contrary, liquors and wines are recognized as commodities which may be lawfully made, bought and sold, and must therefore be deemed to be the subject of foreign and interstate commerce. It was sought to defend the act as an inspection act within the meaning of that provision of the constitution of the United States which permits the States to impose excise duties as far as they may be absolutely necessary for executing their inspection laws. The act does, indeed, contain provisions looking to the ascertainment of the purity of liquors, and to that extent may be said to be in the nature of an inspection law. But those provisions, such as they are, do not, in the view of the court, redeem the act from the charge of being an obstruction and interference with foreign and interstate commerce. In the language of Mr. Justice Shiras, who delivered the opinion of the court, "it is not a law purporting to forbid the importation, manufacture, sale and use of intoxicating liquors as articles detrimental to the welfare of the State and to the health of the inhabitants, and hence it is not within the scope and operation of the act of congress of August, 1890. That law was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are, therefore, the subjects of legitimate commerce. When that law provided that 'all fermented, distilled or intoxicating liquors transported into any State or territory, remaining therein for use, consumption, sale or storage therein, should, upon arrival in such State or territory, be subject to the operation and effect of the laws of such State or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or territory, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise,' evidently equality or uniformity of treatment under State laws was intended. The question whether a given State law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors, and be valid; or it may provide equal regulations for the inspection and sale of all domestic and imported liquors, and be valid. But the State cannot, under the congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

At the time of the enactment of the South Corolina statute, and since, many of the leading authorities upon questions of law contended for its unconstitutionality principally upon the ground that intoxicating liquors being assumed under the terms and spirit of the act to be a lawful subject of commerce, it was an unwarrantable invasion of individual liberty to prohibit citizens from engaging in such commerce. Indeed the Supreme Court of South Carolina so held when the question was first presented to them but this decision was afterwards overruled, the *personnel* of the court having changed in the meantime. See 39 Cent. L. J. 355. The reasoning of the United States Supreme Court, in this latest decision on the subject will afford considerable consolation to those who believe in the law's unconstitutionality. Attention has been called to the cases of *Re* Jacobs, 96 N. Y. 98 and Rippe v. Becker, (Minn.), 57 N. W. Rep. 331, in the former of which the constitutional right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or vocation, was up-

held. In the Minnesota case it was held that the police power of a State to regulate a business does not include the power in the State to engage in carrying it on; that the right of a State to erect elevators and itself go into the grain elevator business cannot be predicated on the police power.

NOTES OF RECENT DECISIONS.

EVIDENCE—PROOF OF DIVIDEND OF CORPORATION BY PAROL.—The Supreme Court of Rhode Island, discussing the question of proof of the voting of a dividend by parol in contradiction of the records of the company, say, in Dennis v. Joslyn Mfg. Co., 36 Atl. Rep. 129, that, as a general rule, the best evidence of the votes of a corporation is the recorded action of its stockholders or officers, although they are not conclusive evidence against a stranger, or against the stockholder in an individual transaction between him and the corporation. The court, in trying to prove the unfitness of the rule allowing parol evidence to show the declaration of a dividend, stated that it is no hardship to a stockholder to refuse such evidence, for he has a simple and ample remedy by taking steps to correct the record. First. In the corporation itself, by calling attention to the error that it may be corrected, or where this will not avail, by *mandamus* to compel the secretary to do his duty as the recorder, or by a bill to correct the record. The court expressed its surprise that no authority for either of these remedies can be found; that no reason can be seen why *mandamus* should not apply to a case like this, as well as to the numerous cases of failure to perform ministerial duties in which it has been so frequently allowed. Cases of errors in records must often have arisen, and probably the reason why no report of such cases can be found, lies in the fact that ordinarily a majority which has the power to pass a vote also has the power to correct the record, when there is error. "Without intending" (said the court) "to lay down a rule beyond the case before us, we decide, that where, as in the matter of a dividend, members of a corporation have a common interest, and right by virtue of the action taken, the record should show what the corporation did, and in case of error the remedy should be by a proceeding to correct the record itself, rather than by parol evidence in collateral suits, which would be liable to different results." The court, therefore, disallowed parol evidence to show that a dividend was voted.

INSURANCE — WAIVER OF DEFENSE. — In Early v. Hummelstoun Mut. Fire Ins. Co., 36 Atl. Rep. 195, decided by the Supreme Court of Pennsylvania, it was held, two of the members of the court dissenting, that where, pursuant to conditions in a fire policy that insured sustaining loss should give notice to the company's president, and he should appoint a committee from the managers to appraise it, the committee was appointed, and the company wrote insured: "Our committee * * * made you an award of $800. This is now ready, and will be paid you whenever you call for it. If this award is not satisfactory to you, you will come and sign an agreement to an adjustment by disinterested persons, as provided by the * * * policy;" and thereafter they negotiated, without anything being said as to a defense on the merits till after the action, brought nearly six months after the fire,—it is a question for the jury whether a defense of breach of material conditions of the policy, existing at the time of the fire, and known by the company when its committee examined the property, was not waived; the company's letter to insured not being an offer of compromise. The court says:

We think, in this state of the testimony, it was the clear duty of the court below to submit the question of waiver to the jury. This is in accordance with several of our recent decisions. In Fritz v. Insurance Co., 154 Pa. St. 384, 26 Atl. Rep. 7, we held that the fact that a fire insurance company appointed an adjuster to adjust a loss, and that, when an adjustment was made, it was received by the company without objection, is sufficient evidence to submit to the jury on the question whether the company had waived a provision in the policy requiring proof of loss to be furnished within 15 days. In McCormick v. Insurance Co., 163 Pa. St. 184, 29 Atl. Rep. 747, we held that the refusal of an insurance company to pay a loss on a specified ground estops it from asserting other ground relieving it from liability, of which it had full knowledge where the insured has incurred expense, and brought suit, in the belief that the only objection was that stated. Mr. Chief Justice Sterrett, delivering the opinion, and adopting the language of Mr. Chief Justice Church, of the New York Court of Appeals, in the case of Brink v. Insurance Co., 80 N. Y. 108, said: "Every consideration of public policy demands that insurance companies should be required to deal with their customers with entire frankness and fairness. They may refuse to pay without speci-

tying any ground, and insist upon any available ground; but when they plant themselves upon a specific defense, and so notify the assured, they should not be permitted to retract after the latter has acted upon their position as announced, and incurred expense in consequence of it." In Freedman v. Association, 168 Pa. St. 249, 32 Atl. Rep. 39, we said: "The trend of our decisions has been to hold insurance companies to good faith and frankness in not concealing the ground of defense, and thus misleading the insured to his disadvantage. They may remain silent, except when it is their duty to speak, and the failure to do so would operate as an estoppel; but, having specified a ground of defense, very slight evidence has been held sufficient to establish a waiver as to other grounds." To the same effect are Gould v. Insurance Co., 134 Pa. St. 570, 19 Atl. Rep. 793; McFarland v. Insurance Co., 134 Pa. St. 590, 19 Atl. Rep. 796; Insurance Co. v. Miller, 120 Pa. St. 504, 14 Atl. Rep. 35; Snowden v. Insurance Co., 122 Pa. St. 502, 16 Atl. Rep. 22; and McGonigle v. Insurance Co., 168 Pa. St. 1, 31 Atl. Rep .868, 875.

CRIMINAL LAW—DYING DECLARATIONS.—In Carver v. United States, 17 S. C. Rep. 228, the Supreme Court decided an interesting question of dying declarations, holding that contradictory statements by the deceased at the time of making a dying declaration are competent as tending to impeach the declaration. The court expressly holds that the general rule, requiring for the impeachment of a witness by proof of contradictory statements a foundation to be laid by asking him whether he made such statements, does not extend to cases of dying declarations. The following is from the opinion of Mr. Justice Brown:

There was also error in refusing to permit the defendant to prove by certain witnesses that the deceased, Anna Maledon, made statements to them in apparent contradiction to her dying declaration, and tending to show that defendant did not shoot her intentionally. Whether these statements were admissible as dying declarations or not is immaterial, since we think they were admissible as tending to impeach the declaration of the deceased, which had already been admitted. A dying declaration by no means imports absolute verity. The history of criminal trials is replete with instances where witnesses, even in the agonies of death, have through malice, misapprehension or weakness of mind, made declarations that were inconsistent with the actual facts; and it would be a great hardship to the defendant, who is deprived of the benefit of a cross-examination, to hold that he could not explain them. Dying declarations are a marked exception to the general rule that hearsay testimony is not admissible, and are received from the necessities of the case, and to prevent an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present. They may, however, be inadmissible by reason of the extreme youth of the declarant (Rex v. Pike, 3 Car. & P. 598), or by reason of any other fact which would make him incompetent as an ordinary witness. They are only received when the court is satisfied that the witness was fully aware of the fact that his recovery was impossible, and in this particular the requirement of the law is very stringent. They may be contradicted in the same manner as other testimony, and may be discredited by proof that the character of the deceased was bad, or that he did not believe in a future state of rewards or punishment. State v. Elliott, 45 Iowa, 486; Com. v. Cooper, 5 Allen, 495; Goodall v. State, 1 Or. 333; Tracy v. People, 97 Ill. 101; Hill v. State, 64 Miss. 431, 1 South. Rep. 494.

It is true that, in respect to other witnesses, a foundation must be laid for evidenceof contradictory statements by asking the witness whether he has made such statements; and we have held that, where the testimony of a deceased witness given upon a former trial was put in evidence, proof of the death of such witness subsequent to his former examination will not dispense with this necessity. Mattox v. U. S., 156 U. S. 237, 15 Sup. Ct. Rep. 337. That case, however, was put upon the ground that the witness had once been examined and cross-examined upon a former trial. We are not inclined to extend it to the case of a dying declaration, where the defendant has no opportunity by cross-examination to show that by reason of mental or physical weakness, or actual hostility felt towards him, the deceased may have been mistaken. Considering the friendly relations which had existed between the defendant and the deceased for a number of years, their apparent attachment for each other, and the alcoholic frenzy under which defendant was apparently laboring at the time, the shooting may possibly not have been with deliberate intent to take the life of the deceased, notwithstanding the threats made by the defendant earlier in the evening. In nearly all the cases in which the question has arisen, evidence of other statements by the deceased inconsistent with his dying declarations has been received. People v. Lawrence, 21 Cal. 368, an opinion by Chief Justice Field, now of this court; State v. Blackburn, 80 N. C. 474; McPherson v. State, 9 Yerg. 279; Hurd v. People, 25 Mich. 405; Battle v. State, 74 Ga. 101; Felder v. State, 23 Tex. App. 447, 5 S. W. Rep. 145; Moore v. State, 12 Ala. 764.

Our attention has been called to but one case to the contrary, viz: Wroe v. State, 20 Ohio St. 460, cited with apparent approval in Mattox Case. But we think, as applied to dying declarations, it is contrary to the weight of authority.

As these declarations are necessarily *ex parte*, we think the defendant is entitled to the benefit of any advantage he may have lost by the want of an opportunity for cross-examination. Rex v. Ashton, 2 Lewin, Crown Cas. 147.

RAILROAD COMPANY—FIRES—NEGLIGENCE—EVIDENCE.—In Patterson v. Chesapeake & O. R. Co., 26 S. E. Rep. 393, decided by the Supreme Court of Appeals of Virginia, plaintiff having shown that a fire was set by defendant's locomotive, the court held that there is a presumption that defendant was negligent, placing on it the burden of proving that it had used the proper precautions for confining sparks and cinders, disapproving Bernard v. Railroad Co., 85 Va. 792, 8 S. E. Rep. 785. The court says in part:

The defendant insists that the burden was not only on the plaintiff to prove that the fire originated from sparks or cinders thrown out by the engine, but that

such sparks or cinders were emitted by the engine because of defects in its construction or condition, and by reason of the fact that it was not equipped with the best appliances for arresting sparks and preventing the emission of burning cinders. In support of this proposition the case of Bernard v. Railroad Co., 85 Va. 792, 8 S. E. Rep. 785, is cited and relied on. It is true, as a general rule, that where no negligence is proved on the part of the railroad company or any of its agents or employees, and negligence is the gravamen of the action, the law does not impute it. It lies on the party alleging it to prove it. It is, however, equally true that where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, the party must prove it, whether it be of an affirmative or negative character. The law on this subject is well stated in 2 Shear. & R. Neg. § 676. It is there said:

"The decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks or cinders (as the case may be) which have been already mentioned as necessary. This is the common law of England, and the same rule has been followed in New York, Maryland, North Carolina, South Carolina, Tennessee, Illinois, Wisconsin, Missouri, Nebraska, and Texas; and it is established by statute in Vermont, Illinois, Iowa, New Jersey, Minnesota, Kansas, Mississippi, and Utah. But it has been sometimes held that the plaintiff is bound to prove affirmatively some precaution which the defendant ought to have taken, and that it did not take it. This ruling is contrary to the plain principle that a party is not required to prove a fact which is necessarily much better known to his adversary than to himself, since the railroad company has unlimited opportunities for knowing the condition of its own engines, while its prosecutor has none at all, until he comes into court. Accordingly such decisions have been overruled by statute in Iowa and Kansas, leaving Pennsylvania and Ohio to stand alone. In every case it is held that a presumption of negligence is raised by evidence that engines are, in common practice, so made as to retain their sparks, and that the particular engine in question did not. And if the particular engine from which the fire proceeded was so made, but it appears that, unless it was watched and kept in order, it would emit sparks, the inference may fairly be drawn that the fire was caused by negligence in its management. On the other hand, evidence that the engine which emitted the sparks had all the best appliances required by the rules previously stated, and was carefully handled, is sufficient to put the burden of proof again upon the plaintiff to show negligence."

It is well settled that testimony is admissible on the part of the plaintiff tending to show that the defendant's locomotive on occasions other than that for which the action is brought had emitted sparks and communicated fire to the property along its track and right of way, for the purpose of showing negligence on the part of the defendant's employees, or defects in the construction of the machinery in question. Railroad Co. v. Thomas (recently decided by this court), 24 S. E. Rep. 264. If proof of other fires establishes negligence on the part of the defendant, surely proof that the railroad caused the fire for which the action was brought must do so, the former being merely cumulative, and intended to show a negligent habit.

The rule laid down by the authorities cited, that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used the best precautions known for confining sparks or cinders, is a wise and just one. The law is liberal in holding that the railroad is exempt from liability when, operated in a lawful manner, and in the exercise of reasonable care and skill, it burns the property of the citizen along its route. To hold that the plaintiff, in addition to proving that the railroad is justly chargeable with the origin of the fire, must also prove affirmatively that its machinery was out of order, would practically defeat a recovery in most cases. The statement of the law as it seems to be laid down in Bernard v. Railroad Co., 85 Va. 792, 8 S. E. Rep. 785, is not in accord with the view herein expressed, and is, therefore, not approved.

MENTAL ANGUISH IN TELEGRAPH CASES.

In an action against a telegraph company for negligence in the transmission and delivery of a message, is mental suffering alone, though resulting naturally and proximately from the neglect, if unaccompanied by any substantial, pecuniary loss or physical injury, a proper element of damage, provided the message was intended for the benefit of the suitor and the company had knowledge of the nature and importance of its contents? This important question was recently answered in the negative by the Supreme Court of Wisconsin.[1] Being a new question in that State and with the single exception of Dakota,[2] the first of its kind in the northwest, we may naturally expect the added authority of so important a court to be of considerable weight in the future and a source of gratification to the telegraph company at least. But is the decision well founded upon logic and justice? The facts involved were substantially the following: A telegram, reading, "Mother is dying. Come immediately," was sent by one brother to another; but, through the fault of the telegraph company, was delayed in delivery some five days, during which time the mother died and was buried without the knowledge of the plaintiff. Plaintiff claimed that he would have gone to his mother's bedside had he received the telegram in time, and that by reason of the negligence of the company in delivering the message, he was

[1] Summerfield v. W. U. T. Co., 57 N. W. Rep. 973, 87 Wis. 1.

[2] Russell v. Tel. Co., 3 Dak. 315.

prevented from doing so and from being with his mother in her last moments, in accordance with her dying request. By reason of such negligence, he claimed to have suffered the damages in question. This state of facts is typical of this class of cases in other States.

A Close Question.—That this is a close question, is shown by the able opposition of learned judges and the frequent dissenting opinions on both sides of the case. The question first came up in Texas, in 1880, and has since been grappled with by only about a dozen States, with an equal division of authority, and the inferior federal courts opposed to such damages. The United States Supreme Court has not yet passed upon it. Dakota, Kansas, Missouri, Mississippi, Georgia, Florida, and Ohio, besides Wisconsin, have sided with the federal authorities, while Texas, Indiana, Kentucky, Tennessee, Iowa, North Carolina, Alabama, with possibly Illinois, together with some of the ablest text-writers, are arrayed against them.[3] There can be no controversy as to who may sue, so long as the suitor is the beneficiary of the telegram. If he is the party injured he is a proper plaintiff, whether he had made the contract with the company or not, and whether he sues on contract or in tort.[4]

An Element of Damage not always a Cause of Action.—At the outset it must be understood that there is a difference between an element of damage and a cause of action. A confusion of these terms has led to a good deal of unsatisfactory and illogical reasoning on the part of courts. Every cause of action is an element of damage, but the reverse is not true. For instance, malice is considered an element of damage; but malice alone will not sustain an action. So say we of mental suffering. It is a well established and inviolable rule of law that, when standing alone, it is insufficient to ground an action upon. But in our opinion it is fully as well settled, that such injuries, if natural and proximate to the wrong, are allowable as an element of damage, whenever an independent cause of action exists. Whether or not this

[3] Cases for and against damages for mental anguish in telegraph cases: Cases for: So Relle v. Tel. Co., 55 Tex. 308, 40 Am. Rep. 805; The G., C. & S. F. Tel. Co. v. Levy, 59 Tex. 563; Stuart v. Tel. Co., 66 Tex. 580, 59 Am. Rep. 633; G., C. & S. F. Ry. Co. v. Wilson, 69 Tex. 739, 7 S. W. Rep. 653; Tel. Co. v. Brown, 71 Tex. 723, 2 L. R. A. 766, 10 S. W. Rep. 323; Tel. Co. v. Cooper, 71 Tex. 507, 1 L. R. A. 728, 9 S. W. Rep. 596; Tel. Co. v. Bruesche, 72 Tex. 654, 13 Am. St. Rep. 843, 10 S. W. Rep. 734; Tel. Co. v. Simpson, 73 Tex. 422, 11 S. W. Rep. 385; Tel. Co. v. Adams, 75 Tex. 531, 6 L. R. A. 844, 12 S. W. Rep. 857; Tel. Co. v. Feegles, 75 Tex. 537, 12 S. W. Rep. 860; Rowell v. Tel. Co., 75 Tex. 26, 12 S. W. Rep. 534; Tel. Co. v. Moore, 76 Tex. 66, 18 Am. St. Rep. 25, 12 S. W. Rep. 949; Tel. Co. v. Kirkpatrick, 76 Tex. 217, 18 Am. St. Rep. 37, 13 S. W. Rep. 70; G., C. & S. F. Tel. Co. v. Richardson, 79 Tex. 649, 15 S. W. Rep. 689; Tel. Co. v. Rosentreter, 80 Tex. 497, 16 S. W. Rep. 25; Tel. Co. v. Jones, 81 Tex. 271, 16 S. W. Rep. 1006; Tel. Co. v. Lydon, 82 Tex. 364, 18 S. W. Rep. 701; Tel. Co. v. Houghton, 82 Tex. 561, 15 L. R. A. 129, 17 S. W. Rep. 846; Tel. Co. v. Nations, 82 Tex. 539, 27 Am. St. Rep. 914, 18 S. W. Rep. 709; Potts v. Tel. Co., 82 Tex. 545, 18 S. W. Rep. 604; Tel. Co. v. Beringer, 84 Tex. 38, 19 S. W. Rep. 336; Tel. Co. v. Wisdom, 85 Tex. 261, 34 Am. St. Rep. 805, 20 S. W. Rep. 56; Tel. Co. v. Carter, 85 Tex. 580, 34 Am. St. Rep. 826, 22 S. W. Rep. 961; Tel. Co. v. Evans, 1 Tex. Civ. App. 297, 21 S. W. Rep. 266; Tel. Co. v. Piner, 1 Tex. Civ. App. 301, 21 S. W. Rep. 315; Wadsworth v. Tel. Co., 86 Tenn. 695, 6 Am. St. Rep. 864, 8 S. W. Rep. 574; Young v. Tel. Co., 107 N. C. 370, 9 L. R. A. 669, 11 S. E. Rep. 1044; Thompson v. Tel. Co., 107 N. C. 449, 12 S. E. Rep. 427; Reese v. Tel. Co., 123 Ind. 294, 7 L. R. A. 583, 24 N. E. Rep. 163; West. Union Tel. Co. v. Cline (Ind.), 35 N. E. Rep. 564; Chapman v. Tel. Co., 90 Ky. 265, 12 Ky. L. R. 265, 13 S. W. Rep. 880; Tel. Co. v. Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 South. Rep. 419; Beasley v. Tel. Co., 29 Fed. Rep. 181; Mentzer v. West. Union Tel. Co. (Iowa), 62 N. W. Rep. 1. See also 24 Weekly Law Bulletin, 22. Cases against: Summerfield v. Tel. Co., 87 Wis. 1, 57 N. W. Rep. 973; Russell v. Tel. Co., 3 Dak. 315, 19 N. W. Rep. 408; Chapman v. Tel. Co., 88 Ga. 763, 17 L. R. A. 430, 15 S. E. Rep. 901, 35 Cent. L. J. 407; Tel. Co. v. Rogers, 68 Miss. 748, 13 L. R. A. 859, 9 South. Rep. 823; West v. Tel. Co., 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. Rep. 807; Int. O. Tel. Co. v. Saunders, 32 Fla. 454, 21 L. R. A. 810, 14 South. Rep. 148; Connell v. Tel. Co., 116 Mo. 34, 20 L. R. A. 172, 22 S. W. Rep. 345; Newman v. Western Union Tel. Co., 54 Mo. App. 434; Kester v. Tel. Co., 8 Ohio, C. C. Rep. 296, 55 Fed. Rep. 603; Morton v. West. Union Tel. Co. (Ohio), 41 N. E. Rep. 689; Chase v. Tel. Co., 44 Fed. Rep. 554, 10 L. R. A. 464 (Ga.), 36; Crawson v. Tel. Co., 47 Fed. Rep. 544 (Ark.); Tel. Co. v. Wood, 57 Fed. Rep. 471, 21 L. R. A. 706 (Tex.); Gahan v. Tel. Co., 59 Fed. Rep. 433 (Minn.); Butner v. West. Union Tel. Co. (Okla.), 37 Pac. Rep. 1087; Francis v. West. Union Tel. Co. (Minn.), 59 N. W. Rep. 1078. See also the recent case of Mitchell v. Rochester Ry. Co., 45 N. E. Rep. 354, 44 Cent. L. J. 89, wherein the Court of Appeals of New York hold that damages are not even recoverable for physical injuries resulting from mental shock. See also 3 Suth. on Damages (2d ed.), p. 2180; 1 Sedg. on Damages (8th ed.), § 43-47; 2 Shearm. & Red. on Neg. (4th ed.), § 756; Thomp. on Elec., § 378 and cases cited.

[4] Who may Sue—Sender or Sendee: Gray, Tel. Com. sec. 65; Wharton on Neg. sec. 758; 2 Thomp. on Neg. sec. 11, p. 847; 3 Suth. Dam. sec. 972; Shearm. & Red. on Neg. sec. 560 (3d ed.); Markel v. Tel. Co., 19 Mo. App. 80; Wadsworth v. Tel. Co., 86 Tenn. 695; Ellis v. Tel. Co., 13 Allen, 227; Tel. Co. v. Dubois, 128 Ill. 248; Tel. Co. v. Hope, 11 Ill. App. 289; West v.

rule is a wise one it is needless to say, so long as it is a well recognized rule of law, supported by authoritative decisions.[5] No matter, then, how great our aversion to damages for injuries of so unsubstantial and shadowy a character, we must recognize the fact, that the principle of their allowance intertwines the entire fabric of the law of damages. To be consistent at least we should be willing to extend the rule to all cases, where it has application. If not, we are confronted with the other alternative, to favor the abolition of compensatory damages for mental suffering in all cases, and who would not say at once that "returning were far more difficult than going over."

A Cause of Action Necessary.—Have we then a cause of action in the present case? To constitute a cause of action there must be a wrong and an injury,—a violation of a right, whether created by contract or given by positive law, and a resulting damage either actual or presumed. Besides, whenever a legal right is infringed, the law presumes some injury and gives nominal damages to protect the right; for it is a familiar maxim, that whenever the law gives a right, it always gives a remedy for the violation of that right.[6] When a legal right has been violated a man is not thrown out of court, even if at the trial it appears that actual advantage instead of loss has resulted to the plaintiff. The defendant cannot take advantage of his own wrong in that way.[7] If a man is assaulted by another, even though no injury whatever be shown, the law says he is entitled to nominal damages, because the legal right of security of person has been violated. A message containing a direction to buy wheat, deliverable at a future time stated, through negligence was not delivered. The market price of wheat, however, turned out to be less on the day specified in the message than on the day when it should have been delivered. Thus there was not only no damage, but the sender was actually saved from the loss which would have accrued, if the message had been delivered and acted upon. But the telegraph company could not take advantage of this fact. Why? Because a legal right had been infringed—the right of the sender to have care and diligence used in the transmission and delivery of his message, and for that he was entitled to nominal damages.[8] It is well to remember that the negligence of a telegraph company in such a case differs essentially from a case of ordinary negligence between individuals, as where A through reckless driving injures B. In the former case no injury need be shown—it is presumed; while in the latter special damage must be alleged and proven in order to show a cause of action. In the latter case, neither by contract nor by positive law, was a duty fixed upon the defendant to do for the plaintiff's sole protection any specific act. In other words, the defendant in such cases does not render himself liable by negligence alone, as does the telegraph company in the case supposed. In telegraph

Tel. Co., 39 Kan. 93; Aiken v. Tel. Co., 5 S. C. 358; Elwood v. Tel. Co., 45 N. Y. 549; Tel. Co. v. Dryburg, 35 Pa. St. 298; Tel. Co. v. Adams, 75 Tex. 531; Harkness v. Tel. Co., 73 Iowa, 190; Tel. Co. v. Carew, 15 Mich. 525.

[5] Cases other than against telegraph companies where mental anguish is an element of damage: 3 Suth. Dam. 259, § 260; Abduction: Stowe v. Heywood, 7 Allen, 113; Magee v. Holland, 27 N. J. L. 86; Seduction: Weaver v. Bachert, 44 Am. Dec. 159, 178; Cooley, Torts § 231; Assault and Battery: Welch v. Ware, 32 Mich. 77; Craker v. C. & N. W. Ry. Co., 36 Wis. 657; Libel and Slander: Terwilliger v. Wands, 17 N. Y. 54; Scripps v. Reilly, 38 Mich. 10; Rep. Pub. Co. v. Mosman, 15 Colo. 399; Eaves Dropping: Cooley, Torts (2d ed.), 69, 70; Ejection of Passenger: Wilson v. Mo. Pac. R. Co., 5 Wash. 621; Mo. Pac. R. Co. v. Martino, 2 Tex. Civ. App. 634; Bass v. C. & N. W. Ry. Co., 36 Wis. 450; Breach of Promise: Wells v. Padgett, 8 Barb. 323; Tobin v. Shaw, 45 Me. 331; Bird v. Thompson, 96 Mo. 424; Burnham v. Cornwell, 63 Am. Dec. 545; Illegal Attachment: Byrne & Co. v. Gardner & Co., 33 La. Ann. 6; Mutilation of Corpse: Larson v. Chase, 47 Minn. 307; Meagher v. Driscoll, 99 Mass. 281; Shipping of Corpse: Hale v. Bonner, 82 Tex. 33; Renihan v. Wright, 125 Ind. 536; Future Suffering: Feeney v. Long Island R. Co., 116 N. Y. 375; Kissing of Female: Craker v. C. & N. W. R. Co., 36 Wis. 657; Spitting in Face: Draper v. Baker, 61 Wis. 460; Bite of Dog: Robinson v. Marino, 3 Wash. 434; Malicious Prosecution: Willard v. Holmes, 21 N. Y. S. 998; Fisher v. Hamilton, 49 Ind. 341; False Imprisonment: Hewlett v. George, 68 Miss. 682; Stewart v. Maddox, 63 Ind. 51; Ball v. Horrigan, 19 N. Y. S. 913; Personal Injury: Johnson v. Wells, Fargo Co., 6 Nev. 230; Seger v. Town of Barkhamsted, 22 Conn. 293; Forcible Entry: Bonelli v. Bowen, 70 Miss. 142; Fright caused by Negligence of Common Carrier: Purcell v. St. Paul City R. Co., 48 Minn. 134; Bell v. Gt. N. Ry. Co., 26 L. R. (Ireland) 428, *as contra*, Ewing v. P., C. & St. L. Ry. Co., 147 Pa. St. 40, and Victoria Ry. Co. v. Caultas, 13 L. R. App. C. 222 (1888).

[6] 1 Suth. Dam. §§ 2, 10, pp. 2, 21; Young v. Tel. Co., 107 N. C. 370, 374; Chapman v. Tel. Co., 90 Ky. 265, 13 Ky. L. R. 265, 267; Larson v. Chase, 47 Minn. 307, 310.

[7] Murphy v. Fond du Lac, 23 Wis. 365.

[8] 1 Suth. § 10, p. 20; Hibbard v. Tel. Co., 33 Wis. 558.

cases and in cases against common carriers for a breach of their contract of carriage, the law permits a tort action, and the breach of the obligation entered into with the individual is the gist of the action. In the ordinary negligence case, not pertaining to contract, the damage itself is the gist of the action, and no cause ensues when no actual damage aside from mental suffering can be shown. Here, then, comes in the distinction between an element of damage and a ground of action to which attention has been called, and explains why mere fright alone caused by the negligence of another, a case which our opponents delight to hurl at us, is not sufficient to sustain a cause of action, while in other cases it is let in as an element among other damages. This distinction is vital and must always be borne in mind. To repeat, then, a telegraph company, by reason of its franchises and privileges and by reason of the public nature of its employment, is under a public duty to promptly transmit and deliver a plain and decent telegram, and when it accepts the usual toll, and undertakes to send and deliver the message, a contractual relation springs up between the company and the party in interest, for a breach of which the law allows nominal damages, besides the price paid for the telegram, if plaintiff has paid the same.[9] Therefore, the cause of action is complete when the breach of this public duty is shown, whether actual, pecuniary or other damage appears or not. You prove your contract by offering the telegram, and then show the negligence in transmission or delivery and the court entertains your suit. If no damage whatever is shown, pecuniary, mental or otherwise, the law presumes and gives nominal damages in order to preserve to the individual the legal right to have that duty performed. It matters not that the contract may be waived and the tort sued upon. The change of remedy which the law permits does not militate against the cause of action, but only affects the rule of damages.

Mental Anguish as an Element of Damage in Actions of Tort.—Having a cause of action, then, let us come to the question now of compensatory damages. We have already said that the law allows for mental injuries in a proper case. If there is still doubt of this proposition, we refer to a leading text book.[10] Mr. Sedgwick specifies the kinds of mental injuries, which may be compensated; and mental anxiety and mortification are included in the list.[11] It will also be seen that the law allows damages for mental injuries, when such injuries are the only ones proven, without evidence of the slightest, actual, pecuniary loss or physical injury, *e. g.*, in an action for libel, where the defamation is actionable *per se*.[12] In such case actual damage to reputation may not be in evidence and injury to feeling only be proven; still the law presumes the damage to reputation to sustain the cause and allows compensation in full for the mental suffering alone.[13] Nor is it an answer to say that these are cases of wantonness or malice, for the damages were compensatory and not exemplary, and compensatory damages aim to amend the injury sustained and not to punish the wrongdoer. I ask, then, in the name of common sense or justice either, why should damages be allowed to compensate the injury in such cases where the only injury is purely mental and not in the telegraph case in question, where just as truly a cause of action exists as well, and the only damage is mental suffering?

The Rule of Damages in Tort.—Such mental anguish then being a proper element in a proper case, whether alone or accompanied by other injury, the only remaining requirement is that such damage should conform to the rule of damages generally. This rule in tort actions is that damages must be the direct, proximate and natural result of the wrongful act.[14] In other words, "the wrongdoer is answerable for all the injurious consequences of his tortious act which according to the usual course of events and general experience, were likely to ensue and which therefore when the act was committed he may reasonably be supposed to have foreseen and anticipated."[15] Why then should an injury to the feelings, which is as real and often more injurious than a physical one, be ex-

[9] Logan v. Tel. Co., 84 Ill. 468.

[10] 1 Sedg. Dam. § 39 (8th ed.), and § 43, and cases cited.

[11] 1 Sedg. on Dam. (8th ed.), § 47.

[12] Republican Pub. Co. v. Mosman, 15 Colo. 390.

[13] See also Craker v. C. & N. W. R. R., 36 Wis. 657, and Larson v. Chase, 47 Minn. 307.

[14] Larson v. Chase, 47 Minn. 312.

[15] 1 Suth. Dam. § 45, p. 92; Wadsworth v. Tel. Co. 86 Tenn. 695, 700.

cluded from the estimate? Why, being entitled to some damage by reason of the company's wrongful act, should not the plaintiff recover all the damages arising therefrom and within the rule just laid down? Does it need any argument to show that the injury is such as would naturally result from the company's act in such an instance and according to the "usual course of events and general experience," and therefore such as the company might "reasonably be supposed to have foreseen and anticipated?" Then, too, how can such injury be called remote, when the mere reading of the message itself would suggest the consequences of delay or failure to deliver. Remember the words, "Mother is dying. Come immediately." To say, at one time, if a telegraph company undertakes to transmit and deliver promptly a message, wherein dollars and cents alone are involved and its negligence occasions loss, that it may be compelled to respond in damages, and at another time when for the same pecuniary consideration it undertakes to transmit and deliver a message informing a man of the dangerous illness of his mother and requesting his presence, and again it negligently fails to deliver the telegram, whereby as a result the son is deprived of the opportunity of seeing her once more either alive or dead, to then say that the telegraph company is liable only for nominal damages, is indeed a parody on justice and an outrage to common sense.

The Reasoning of the Opponent of Such Damages.—What valid reason then do the opponents of mental damages rely upon? The opinions in the following cases are among the ablest and present a full and fair discussion of the opposite view.[16] Of these the opinions most often cited are those of Judge Cooper in the Mississippi case, Judge Gantt in the Missouri case and Judge Lurton in the Tennessee case. A careful perusal of these opinions will disclose the strong points of the opposition. In their own language, they are practically as follows, says Judge Cooper:[17]

"We are unwilling to depart from the long-established and universal rule of law that no action lies for the recovery of damages for mere mental suffering, disconnected from physical injury and not the result of the willful wrong of the defendant;" and again he says: "Damages for mental suffering have been very generally allowed in three classes of cases; (1) Where, by the merely negligent act of the defendant, physical injury has been sustained; and in this class of cases they are compensatory, and the reason given for their allowance by all the courts is that the one cannot be separated from the other. (2) In actions for the breach of contracts of marriage. (3) In cases of willful wrong, especially those affecting liberty, character, reputation, personal security or the domestic relations of the injured party," and if we couple herewith the reasons assigned by Judge Lurton,[18] why an action for such damages ought not to be sustained, we have the chain of reasoning complete upon which the opposition rest their case. Says he, "The reason why an independent action for such damages cannot and ought not to be sustained is found in the remoteness of such damages and in the metaphysical character of such an injury, considered apart from physical pain. Such injuries are generally more sentimental than substantial. Depending largely upon physical and nervous condition, the suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated and impossible to disprove, it falls within all of the objections to speculative damages, which are universally excluded, because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as mere compensation to the plaintiff, is not to be expected."

Arguments Considered.—Let us consider these propositions. The classification of Judge Cooper is truthful and quite exhaustive. He has clearly enumerated all the classes of tort where mental anguish is ad-

[16] See the dissenting opinion by Judge Lurton in Wadsworth v. Tel. Co., 86 Tenn. 695; Summerfield v. Tel. Co. (Wis.), 57 N. W. Rep. 973; W. U. Tel. Co. v. Rogers, 68 Miss. 748; Connell v. Tel. Co., 116 Mo. 34; Saunders v. Tel. Co. (Fla.), 14 South. Rep. 148; Chapman v. Tel. Co., 88 Ga. 763; West v. Tel. Co., 39 Kan. 93; Russell v. Tel. Co., 3 Dak. 315.

[17] W. U. Tel. Co. v. Rogers, 68 Miss. 753.

[18] Dissenting opinion in Wadsworth v. Tel. Co., 86 Tenn. 721.

mitted without question. In his enumeration, however, he admits that in a proper case, mental suffering is a subject of compensation, even if unaccompanied by physical injury or pecuniary loss, as might readily happen in the third class mentioned. It is interesting to note, too, that about the only class of torts which he has omitted in his third classification are those in which special damage must be proven to sustain a cause of action. In the classes he mentioned a cause of action exists, irrespective of the mental injury. To which group then shall we add the telegraph cases? To those in which special damages must be alleged and proven to give a cause of action or do they belong in Judge Cooper's list among the torts where a cause of action exists, independent and irrespective of the mental suffering with special damage first being shown? Clearly the latter. If this be true and our reasoning correct, how is our position a departure from long-established and universal principles? To prove it an innovation they cite among others a number of *dicta* from personal injury cases; and to them we give our fullest approval when applied to the cases with respect to which they are made. But they are applicable peculiarly to those cases of negligence we have spoken of, where physical injury is the sole ground of the action, and without which the action will not lie at all. Our opponents here confuse as they so often have done, mental suffering as a ground of action and mental suffering as an element of compensatory damage. They state in most instances a right rule of law but give a wrong reason for the rule.[19] For instance they delight to repeat the authority of Lynch v. Knight,[20] and Wyman v. Leavett,[21] so much so that these have become recognized as leading cases against recovery for mental anguish alone. And yet, while many able judges have relied upon them as maintaining the opposite proposition, we cannot regard their views as authoritative unless *communis error facit jus*. Their opinions apparently all rest upon a misconception of Lord Wensleydale's meaning in the English case above where he said: "Mental pain or anxiety the law cannot value and does not pretend to redress, when the unlawful act complained of causes that alone; though where a material damage occurs and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested." This we maintain is sound, but must be read in connection with the case, when the meaning becomes clear. The case was an action of slander, brought for an imputation on the plaintiff's chastity. The decision was, that such an imputation was not actionable *per se* and as no special damage aside from mental injury had been shown it failed. There was no cause of action. The case can be no authority for the proposition, that, notwithstanding we have a cause of action, mental suffering alone, if the natural and proximate result of the actionable wrong, is never a proper subject of compensation. In the Maine case there again was no cause of action. The complaint alleged negligence in blasting rock and no damage was shown except the fright and mental anxiety of the plaintiff for the welfare of others. The case was properly thrown out of court. Many such cases have been cited to show that no recovery can be had for mental suffering whenever a distinct element of damage, when in reality they only showed either that mental anguish alone is not a ground of action or that the mental suffering was not the reasonable and proximate result of the actionable wrong.[22] We apprehend that the elaborate reasons assigned by Judge Lurton why such damages cannot sustain a cause of action are also true in point of fact. He has given the true reason why the law was cautious against entertaining suits, where no legal right was infringed and only mental injury resulted. But we are not discussing mental anguish as an independent cause of action. Judge Lurton may be opposed to allowing compensation for mental injury in all cases. But we must accept the law as it is, when supported by overwhelming authority. We may deplore the fact that such damages were ever allowed

[19] Larson v. Chase, 47 Minn. 312.
[20] 9 H. L. Cases, 598.
[21] 71 Me. 227.

[22] Cases illustrating that mental anguish alone will not sustain a cause of action etc.: Lynch v. Knight, 9 H. L. C. 577, 598; Wyman v. Leavitt, 71 Me. 227; Clinton v. Laning, 61 Mich. 355; Bovee v. Town of Danville, 53 Vt. 183, 190; Hirshfield v. Ft. Worth Nat. Bank, 83 Tex. 452; Allsop v. Allsop, 5 Hurlst. & N. 534; Owen v. Heuman, 1 Watts & S. 548; Fox v. Borkey, 126 Pa. St. 164; Lehman v. City Ry. Co., 47 Hun, 255; Keyes v. Ry Co., 36 Minn. 290, 293; Ferguson v. Davis Co., 57 Iowa, 601.

at all or we may go to the other extreme and criticise the policy, which compels the law of torts to lag behind the law of damages and regards some elements of compensation as insufficient to ground a suit upon. But we are dealing with the existing state of the law and that is clearly this: Whenever a man has a good cause of action, the law permits all the surrounding circumstances to go to the jury to enable them to reach as just a verdict as man, with his imperfect faculties, may render. They say you can neither demonstrate the existence, nor prove the extent of, nor adequately compensate the injuries to the mind. How then is it done in breach of promise cases, where injured affections play so important part? How is it done in the other cases mentioned by Judge Cooper. Plainly the law says: "This is a matter for the jury." We cannot alter the fact.

Cases of Wantonness and Malice.—This brings us to the cases of wantonness and malice. When we call attention to the Craker Case in Wisconsin or mention the case of assault without physical contact or again the case of false imprisonment without actual restraint, we are told that here is a violation of the person, carried even to the extent of malice or wantonness. But this blank assertion assigns no reason. It only insinuates that such damages are necessary in this case to punish the wantonness. But this would imply exemplary damages. What then becomes of the rule that exemplary damages are not allowable unless they are supported by compensatery damages? The law says exemplary damages cannot rest back upon nominal damage merely. But the violation of the person alone, without some damage either to body or mind or purse, for which compensation might be allowed, would only permit nominal damages. The fact is the entire verdict in the Craker case was compensatory. So it was in the Minnesota case.[23] Furthermore, Massachusetts, New Hampshire, Colorado and certain other States allow no exemplary damages in any case, and yet they give substantial verdicts for cases of wantonness and malice like those just mentioned. Surely here too the damages must be purely compensatory. Compensatory of what? Nothing unless it be the aggravated injury to the mind. Says Judge Campbell:[24] "When the law gives an action for a willful wrong, it does it on the ground that the injured person ought to receive pecuniary amends from the wrong-doer. It assumes that every such wrong brings damages upon the sufferer and that the principal damage is mental and not physical. And it assumes further that this is actual and not metaphysical damage and deserves compensation."[25] But even in this class of cases, our theory that there must be a cause of action is correct. For to make it actionable the wantonness or malice must have taken effect upon the person, property or some other legal interest of the plaintiff, for malice alone without such effect does not give a cause of action, no matter how aggravated the injury to the feelings. The only cases in the books to our knowledge, which do not allow damages for mental suffering, when the direct and natural result of a wrong and when a cause of action otherwise exists are two in number, action for death by wrongful act and actions for damages resulting from the sale of intoxicating liquors. But both arise under special statutes, which have been given a certain interpretation by the courts. As they are actions that did not exist at the old common law, they only help to prove the rule. We think, then, that Judge Cooper's summary is incomplete and approve rather the summary of Judge Slayton.[26] He says, "the cases in which damages have been allowed for mental distress * * * the mental distress was the incident to a bodily injury suffered by the distressed person, or cases of injury to reputation or property, in which pecuniary damage was shown, or the act such that the law presumes some damage however slight, from the act complained of." If this were not the right rule no damages could be recovered in the case of unlawful mutilation of a dead body. No money has been lost, no physical injury sustained, and to say the act was maliciously done, does not go far enough, for that alone will not give an action. It depends here entirely upon the nature of the act done. The absolute property right in the corpse has been violated, a legal right has

[23] Larson v. Chase, 47 Minn. 307.

[24] Welsh v. Ware, 32 Mich. 77, 84.

[25] See also, Hawes v. Knowles, 114 Mass. 518.

[26] 59 Tex. 563, 568, cited with approval by Judge Gantt in Connell v. Tel. Co., 116 Mo. 34.

been infringed and a cause of action accrues. Practically the only law against us, then, is the opinions of judges in these very telegraph cases; and here the authority is much divided. This is always so when a new case, depending upon an entirely new set of facts calls for adjudication. The question has been before the courts of only twelve States and that only very recently. We must not forget that telegraphy is of comparatively modern origin and that the law concerning the duties and liabilities of the telegraph companies has hardly passed its infancy and cannot be expected so early in its history, to be settled even in its important features by a long line of concurring decisions. What then if a few recent decisions are against us under such circumstances, especially if, as we believe, they are arrayed against sound principles of law and arise out of a misconception and misunderstanding of a few early but properly decided cases. We must remember, too, that the common law is a growth. It is not the spontaneous product of one man or one age, but has progressed with changing circumstances and conditions. We live especially in an age of new made law, adaptive to the many agencies that spring into existence almost daily and create new applications of old and well tried principles. In this manner fifty years of railroad law has been added to the body of legal lore and we doubt if a single well established principle has been overturned. I do not question that the business of the courts is conservatism, nor do I deny that they should look to the legislature to institute a change of principle; but where the case is only new in the instance and the only question is upon the application of an old principle to a new case, the courts should act freely without fear of the imputation of recklessly departing from the headlands of the law. We are willing to admit, too, that the rule may be somewhat technical, but not any more technical and absurd than to say, as our opponents, that such damage is allowable as soon as a cent's worth of loss is proven or the slightest physical injury sustained. This is indeed "putting the pyramid on its apex;" and after all, whether technical or not, it is just such technicality that all law rests upon and that makes it possible to recompense a man against an injury as grievous as almost any bodily injury which might befall him where now he may be laughed out of court and have insult added to injury, by having the price of the telegram returned to him. The injustice on the face of it calls for redress.

OSCAR H. ECKE.

INNKEEPERS—LIABILITY — THEFT BY SERVANTS.

CUNNINGHAM v. BUCKY.

Supreme Court of Appeals of West Virginia, Dec. 9, 1896.

1. An inn or hotel keeper is a guarantor for the good conduct of all members of his household, including those engaged in his service, and is liable for thefts committed by them of the property of his guests while asleep in rooms assigned them.

2. The fact that the guest is intoxicated or his door is unlocked will not destroy the landlord's liability for the acts of his servants.

DENT, J.: W. A. Cunningham obtained a judgment for $254.40 on the 18th day of May, 1895, the Circuit Court of Randolph county, against Alpheus Bucky, who obtained a writ of error therefrom to this court. The errors assigned are for the refusal of the court to give certain instructions for the defendant, and the giving of certain instructions for the plaintiff, and the overruling of the motion for a new trial. The cause of the action is the loss of $240 on the part of plaintiff, by theft, while stopping at defendant's hotel, in the town of Beverly, Randolph county. The evidence is all certified. Hence it becomes the duty of the court, in accordance with its former rulings, to first determine whether the verdict of the jury is sustained by a plain preponderance thereof, and if so, to disregard all errors of law, if any were committed, which do not in a material degree tend to produce the result reached (Bank v. Napier, 41 W. Va.—,23 S. E. Rep. 800); for if the court finds, on an examination of the evidence, that the conclusion reached is sustained by a decided or plain preponderance thereof, and is in accordance with law, although errors may have been committed in the giving of instructions or otherwise, the judgment will not be reversed. A reversal in such case would be abortive and injurious to both parties, as prolonging useless litigation. A result having been reached plainly in accord with the evidence and the law cannot be overthrown by the rulings of the court, however erroneous, for such errors would not be to the prejudice of the party complaining. Plate v. Durst, 41 W. Va.—, 24 S. E. Rep. 580.

The circumstances of the case are as follows, to-wit: Plaintiff went to the defendant's hotel, called the "Valley Hotel," to stop for a few days at the most. His home was in Virginia. He had an arrangement with defendant to board the mail carrier at reduced rates, and, when stopping there, was accorded these rates himself. On this

occasion, he had received payment of a draft; was drinking, and slightly intoxicated; exhibited his money freely; was arrested, fined, and paid the same. Mrs. Bucky, during the day, asked him to let her take charge of his money. This he declined to do, saying he was able to take care of his own money. At night he was assigned to a room which had two outside doors, both of which were locked and bolted. Another door opened in another small room, which communicated with the office through another door. There was no way of fastening the door between the rooms on plaintiff's side, but the door of the outer room, which communicated with the office, had a lock on, with a key in it. The son of the proprietor says he gave the key of this door to plaintiff, but plaintiff says that he simply told him that the doors between the rooms could not be fastened, but that he would see that the office door was properly fastened, and relying on this statement, he (plaintiff) paid no more attention to the matter. He examined his pocketbook, to see that his money was in it; then placed it down in his coat pocket, and hung his coat on the bedpost, and retired for the night. On awakening in the morning, he noticed the pocketbook had been disturbed, and, on examining it, found his money gone. He got up, went out, found the colored porter, and acquainted Mr. Bucky with his loss. The money could not be found, and has never been restored, and amounted to $240. W. H. Franklin, a colored servant, employed about the hotel, testified, in substance, as follows, to-wit: That he got up as usual the morning of the theft, about daylight, and was busy about his customary duties, sweeping out the office and hall, when Mrs. Bucky, wife of the defendant, came into the office where he was sweeping, and told him to stop awhile, and stand still, and then she went in through the doors into Mr. Cunningham's room, and in a short time returned, with a pocketbook in her hand, and went around behind the counter, and says, "Now, Franklin, never say anything about what you see me do." She then opened the pocketbook, and took several bills out of it, and then handed the pocketbook to him, and told him to take it back, and put it in Mr. Cunningham's coat pocket. He slipped in, and did as she told him. Mr. Cunningham was asleep. She then called him around to a side door, and told him not to say anything about what he saw her do, and gave him two five-dollar notes, a two-dollar note, and a one-dollar note. That afterwards he went on with his sweeping, until Mr. Cunningham came out, and told him to call Mr. Bucky. After a few days, hearing that he was going to be arrested, he left, and went to Barbour county, where he was arrested, and brought back, and lodged in jail. As to this witness' implication in this theft there is no conradiction. That he knows how and when and by whom the money was stolen is plainly evident. That he was in Mr. Cunningham's room, and had Mr. Cunningham's pocketbook in his hands, cannot be denied. The only evidence against Mrs. Bucky is the very peculiar statements of a self-confessed accomplice, who is uncorroborated, but contradicted by Mr. and Mrs. Bucky, and by his own preposterous story; for it is beyond belief that Mrs. Bucky would make up her mind to rob the plaintiff in the manner narrated, and take a colored tramp into her confidence, with whom she had only been acquainted five weeks. When she defended his good name, she was warming a snake in her bosom. But its bite, on account of its fangless condition was not poisonous. But Mr. Buckey can hardly escape so well. It is plainly evident who committed this theft; and the sole question is, on whom does the law fix the loss? We have no statute on the subject, and must be governed by the common law.

By the common law of England, an innkeeper is responsible for the loss of the goods or money of a traveler who is his guest whenever the loss is not occasioned by the default of the traveler himself, the act of God, or the queen's enemies. Saund. Neg. 212. "An innkeeper, like a common carrier, is an insurer of the goods of his guests, and he can only limit his liability by express agreement or notice." 2 Kent. Comm. 594. "The common law, as is well known, upon grounds of public policy, for the protection of travelers, imposes an extraordinary liability upon an innkeeper for the goods of his guest, though they have been lost without his fault." Am. & Eng. Enc. Law, 11, 51. "If an innkeeper fails to provide honest servants and honest inmates, according to the confidence reposed in him by the public, his negligence in that respect is highly culpable, and he ought to answer civilly for their acts, even if they should rob the guests who sleep in his chambers." Jones, Bailm. 94 96. Generally, and perhaps universally, he has been held to an absolute responsibility for all thefts from within or unexplained, whether committed by guests, servants, or strangers." "The general principle seems to be that the innkeeper guaranties the good conduct of all persons whom he admits under his roof, provided his guests are themselves guilty of no negligence to forfeit the guaranty." Cutler v. Bonney, 30 Mich. 259. "Proof of the loss by the guest while at the inn is presumptive evidence of negligence on the part of the innkeeper or of his domestics. It is the duty of the innkeeper to provide honest servants, and keep honest inmates, and to exercise exact care and vigilance over all persons who may come into his house, whether as guest or otherwise. By the common law, he is responsible, not only for the acts of his servants and domestics, but also for the acts of other guests." Jalie v. Cardinal, 35 Wis. 118. "Neither the length of time that a man remains at an inn, nor any agreement he may make as to the price of board per day or week, deprives a person of his character as a traveler and guest if he retains his *status* as a traveler in other respects." *Id.*

There is no question that the plaintiff was a

guest at the defendant's hotel, and that while there, he was robbed in his room while asleep, from within the defendant's family, including his servants. That he had been drinking, was careless with his money, and trusted in the honesty of defendant's household, and refused the services of Mrs. Bucky as to the care of his money, will not excuse the defendant from the dishonesty of those admitted to his employment. It was his duty to surround himself with honest servants, for the protection of the public; and he cannot excuse himself from liability by showing that the servant was a stranger, and hired on recommendation as to good character. He should have exercised care and vigilance over wandering servants admitted to his house, and see that they did not have the opportunity to steal from his guests. As Judge Dixon says in Jalie v. Cardinal, above cited: "If drunk, the plaintiff might still have claimed the protection of his host, as did Falstaff when he fell asleep 'behind the arras,' and might say with him: 'Shall I not take mine ease in mine inn, but I shall have my pocket picked?'" The plaintiff was taking his ease in his inn under the protecting ægis of his host when he had his pocket picked, evidently by a member of the defendant's household, for whose good conduct he was guarantor, and for whose malfeasance he was liable to his guests. Such being the plain conclusion of the law, any error that the circuit court may have committed in the giving or refusing instructions was not prejudicial to the defendant, and it becomes unnecessary to consider them.

From an examination of the instructions, it is apparent that the defendant received greater consideration therein than the law justifies. For instance, the court gave the following instruction in his behalf: "Instruction No. 1. The court instructs the jury that, although they may believe that the plaintiff was robbed in the hotel of the defendant while he was abiding therein as a guest, still, if the jury further believe that the negligence of the plaintiff in displaying his pocketbook or money contributed to such robbery in a material way, then the jury shall find for the defendant, unless they further believe from the evidence that the wife of the defendant stole the said money." An innkeeper is not only responsible for the misconduct of his wife, but also of all those connected with the hotel service; and no display of a guest's money will relieve the landlord from the dishonesty of his servant in stealing it, for, as heretofore shown, he is a guarantor of his honesty.

The right of the plaintiff to release part of the verdict is settled in the case of Railroad Co. v. Blake, 38 W. Va. 718, 18 S. E. Rep. 957. For want of prejudicial error, the judgment is affirmed.

NOTE.—As the principal case shows, the liability of an innkeeper is more severe than that of any other bailee except a common carrier (McDaniels v. Robinson, 26 Vt. 3, 62 Am. Dec. 574; Curtis v. Murphy, 63 Wis. 4, 53 Am. Rep. 241), though the exact extent and limits of an innkeeper's liability for the goods of his guest are not harmoniously settled by the decisions. See Clute v. Wiggins, 14 Johns. (N. Y.), 7 Am. Dec. 452; Cutler v. Bonney, 30 Mich. 259, 18 Am. Rep. 130, with note; McDaniels v. Robinson, 26 Vt. 216. Despite the divergence of the decisions in regard to the scope of the liability of the innkeeper, it has generally been held that he is absolutely liable for all thefts from within or unexplained losses of property in his charge, but that he may be discharged from liability by any contributory negligence of the guest, his servants or companions, and in many cases, he has been discharged where the guest exercised any special control over his property. 11 Am. & Eng. Encyclopedia of Law, p. 53. But conflicting views have been held concerning the liability of the innkeeper for losses by purely accidental casualties or acts of force from without. See Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657; Lanier v. Youngblood, 73 Ala. 587; 2 Parsons, Cont. 146; 2 Story's Cont. § 909; Chitty on Cont. 675; 2 Kent's Com. 593; Wharton on Neg. § 678; Story on Bailments, § 472. According to the stricter view, nothing short of inevitable accident, casualty of war or act of the guest, his servants, or friends of his company will excuse the innkeeper. Russell v. Fagan (Del.), 8 Atl. Rep. 258. Innkeepers are answerable for the honesty not only of their servants, but of their guests. Gils. v. Libby, 36 Barb. (N. Y.) 70; Dessauer v. Baker, 1 Wils. (Ind.) 429; Merritt v. Claghorn, 23 Vt. 177. Some of the cases hold that the innkeeper is not responsible when the loss is occasioned by inevitable casualty, by irresistible force, by superior force, or by robbery or burglary committed by persons from without the inn. Kister v. Hilderbrand, 9 B. Mon. (Ky.) 72, 48 Am. Dec. 416, and some go even further and hold that the presumption of negligence may be rebutted by showing that there was no negligence in point of fact on his part or that of his servants. Pinkerton v. Woodward, 33 Cal. 557, 91 Am. Dec. 657. But the preponderating weight of authority from the time of the decision in Calye's Case, 8 Coke, 32, to the present time is said to be in favor of the rule that he is liable as an insurer and is responsible for a loss occasioned by his servants, by other guests by robbery, or burglary from without the house or by rioters or mobs. 11 Am. & Eng. Encyclopedia of Law, p. 57. In many of the States innkeepers are by statute relieved from liability in respect to the loss of articles by their guests on complying with certain requirements. In 30 Cent. L. J. p. 160, the liability of innkeepers for loss of property of guests is discussed and English and American decisions bearing upon the subject collected in a note to Coskery v. Nagle, 83 Ga. 696, 10 S. E. Rep. 491. The following are the more recent cases on the subject: An inmate of a lodging-house who leaves the door of his room unlocked, knowing that persons may enter the house and go to his room unnoticed, cannot recover of the keeper of the house for property stolen from his room, being himself lacking in ordinary care. Swann v. Smith, 14 Daly, 114. An innkeeper is liable for goods stolen in his house from a guest, unless stolen by the servant or companion of the guest, except where the negligence of the guest contributes to the loss. Shultz v. Wall (Pa.), 19 Atl. Rep. 742, 26 W. N. C. 51. The delivery of baggage by an innkeeper to an apparent stranger without an effort to verify his claim to the property, and without inquiry as to its ownership, is an act of gross negligence for which the owner may recover, though the innkeeper was merely a gratuitous bailee of the baggage. Wear v. Gleason

(Ark.), 12 S. W. Rep. 726, 52 Ark. 364. An innkeeper is *prima facie* liable for any loss or injury to the goods of his guest, though he may exculpate himself by proof that the loss or injury happened without any fault or negligence on his part, or on the part of his servants, so that in an action by a guest for such loss, the complaint need not allege that plaintiff was free from fault or negligence. Bowell v. De Wald (Ind. App.), 28 N. E. Rep. 430, 2 Ind. App. 303. The failure of a guest to inform an innkeeper that his valise, placed by the innkeeper's servant in the cloak or baggage room, contains valuables, is not negligence. Bowell v. De Wald (Ind. App.), 28 N. E. Rep. 430, 2 Ind. App. 303. An hotel keeper in whose safe a regular boarder deposits money for safe keeping is, at most, a bailee for hire, and is not liable therefor where his night clerk steals the money from the safe, in the absence of any proof of want of ordinary care in employing him. Taylor v. Downey (Mich.), 62 N. W. Rep. 716. An innkeeper's liability for the baggage of his guest does not cease as soon as the guest pays the bill, and leaves the inn, but continues for such a reasonable time as may be necessary to remove the baggage. Maxwell v. Gerard, 32 N. Y. S. 849, 84 Hun, 537. Plaintiff occupied a room on the ground floor of defendant's hotel, with a window opening three feet above the public street. He retired about 1 o'clock at night, and there was some evidence that he was then under the influence of liquor. He left the window open, and the light burning in his room. While he was asleep, some of his effects were stolen from his room. Held, that the question of contributory negligence was for the jury. Becker v. Warner, 35 N. Y. S. 739, 90 Hun, 187. An hotel keeper is not relieved from liability for loss of a guest's property, including samples of goods, taken from his room by a fellow guest, admitted thereto by the chambermaid, merely because she had several times seen the two guests together in the room, or because, as the proprietor afterwards learned, the guest had authorized his fellow guest to sell goods from the samples, as it does not follow therefrom that he had given him authority to have access to the room. Jacobi v. Haynes, 35 N. Y. S. 120.

CORRESPONDENCE.

CONSTRUCTION OF THE NEBRASKA ASSIGNMENT LAW.

To the Editor of the Central Law Journal:

Believing that it is not only proper, but the duty of an attorney who has been engaged in a case to criticise a decision of a court of last resort whenever he is clearly satisfied that the opinion is wrong, I take this opportunity of telling the bar of Nebraska that our supreme court will probably reverse on the first opportunity the opinion in Jerome H. Sager v. Charles E. Summers. This case called for a proper rule of construction of statutory or constitutional law, and in particular of the assignment law of Nebraska, which law was passed in 1883, and in the spring of 1892, for the first time, came before our supreme court for construction in Lancaster County Bank v. Horne, 34 Neb. 742, where it was held without a dissenting opinion that "an assignment for the benefit of creditors, as it secures an equitable distribution of the proceeds of the debtor's property among his creditors will be sustained, if possible, and where the assignee has taken actual and exclusive possession of the personal property assigned, such possession cannot be disregarded by third parties on the ground of want of notice. The statutes merely provide for a registry of the instrument." We have quoted the second and third points in the syllabus of that case, and following it in the spring of 1896 this same law came before the supreme court of our State in the case of Deere v. Losey, 47 Neb. 622, where it was held again that where personal property alone was conveyed by an assignment to the sheriff that it did not require a witness to the instrument. But for many years in Nebraska we have had a very competent compiler of our statutes who, at the close of each setting of the legislature, has gotten out a statute of this State, and, he being considered in the light of a public printer, has always punctuated the laws he found on file in the office of the secretary of State as he thought proper and according to his good judgment, and when he came to compile the aforesaid assignment law he put a comma after the word acknowledged in the fourth line of section 6, chapter C, compiled statutes Nebraska, 1895. And long after the two decisions of Lancaster County Bank v. Horne and Deere v. Losey, *supra*, the case of Sager v. Summers came before the same court as well as the same members of the court who decided the case of Deere v. Losey and several of the same members who decided the case of Lancaster County Bank v. Horne, and on October 21st, 1896, the opinion in the Sager case was filed overruling both the above cases, upon the sole ground that the compiler of the statutes had put a fatal comma after the word acknowledged in the fourth line of section 6, chapter 6, and the comma is held to be a pure interpolation in the law of assignment by the compiler. See N. W. Rep.—— of date Dec. 7th, 1896, p. 614. And the court, on p. 615, says: "In Deere v. Losey, 48 Neb. 622, we reached a contrary conclusion, but we were led into that error by the punctuation of section six of the assignment act found in the compiled statutes. In that section the compiler placed a comma after the word acknowledged in the fourth line of said section 6, and would justify a reading of that section as follows: · · · "But in looking at the enrolled act in the secretary of State's office and at the section as printed in the session laws of 1883, see Session Laws of 1883, p. 67, it will be observed that the only comma in the first sentence of said section is after the word 'writing' which makes the section read in effect that a deed of assignment shall be in writing, and shall be executed and acknowledged, in the same manner that an ordinary deed of real estate is required to be executed and acknowledged to entitle it, the ordinary deed of real estate, to be recorded. Deere v. Losey is therefore overruled." · · · The court then proceeds to overrule the case of Lancaster County Bank v. Horne. The honorable commissioner who filed the opinion in Sager v. Summers, in substance, says that the supreme court was led into its unanimous opinion in the cases of Deere v. Losey, in the 48th Nebraska and Lancaster County Bank v. Horne, by reason of the punctuation and a certain comma appearing in the printed compiled statutes of this State when in the original law on file in the secretary of State's office, the punctuation and comma differ from the printed statutes and appear in the original law in a different place, thereby, as the learned commissioner holds, the meaning of the law is actually changed by these stops, dots and points, and a long line of conduct and course of decisions in this State, upon the construction of our statutes, are to be reversed and wiped out of our reports.

The reasons advanced in the opinion by the learned commissioner for the overturning of the decisions of

this court, in the cases of the Lancaster County Bank v. Horne and of Deere v. Losey, are unique and stand alone, for in the opinion of every court in the United States that have been called upon to put a proper construction upon statutory or constitutional law the exact contrary has been held. Lord Kenyon, Ch. J., in Doe v. Martin, 4 T. R. 65; Sedgwick, Statutory and Constitutional Law (2d Ed.), 223; Bouv. Law Dic. 347-402; Barrington, Stat. (4th Ed.) 438; Price v. Price, 10 Ohio St. 316; Cushing v. Warnick, 9 Gray, 385; Gyger Estate, 65 Pa. St. 311; Hamilton v. Hamilton, 16 Ohio St. 432; Hammock v. Farmers' Loan & Trust Co., 105 U. S. 77. And it is elementary and fundamental that punctuations in a statute forms no part of the law, but it is the work of the draughtsman, engrosser or public printer. Albright v. Payne, 43 Ohio St. 14-15; Com. v. Ellison, 28 S. Car. 238; Bradstreet v. Gill, 72 Tex. 115; Allen v. Russell, 39 Ohio St. 337. And punctuations and commas may be, and frequently are, disregarded altogether, and the courts will correct and repunctuate to give effect to what is plainly the legislative intent. Martin v. Gleason, 139 Mass. 187; Randolph v. Bayne, 44 Cal. 266. In case of United States v. Lacher, 134 U. S. 628, Fuller, C. J., says: "For the purpose of arriving at the true meaning of a statute courts will read with such stops as are manifestly required;" and holds that a comma should be treated as a semicolon, and in another case a comma was taken from before a word and placed after the same word to give effect to the true purpose of the statute. Albright v. Payne, 43 Ohio St. 14. *In re* Olmstead, 17 Abb. N. Cas. (N. Y.) 320, a statute was construed as if a comma were substituted for a semicolon. In State v. Payne County, 29 Pac. Rep. 789, it is said: "As to the contention in reference to the punctuation of the statute it is enough to say that the rule is, that courts will in the construction of statutes for the purpose of arriving at the real meaning and intention of the law makers, disregard the punctuation, or repunctuate if need be to render clear the true meaning of the statute." Ancient inscriptions and writings show that the words were grouped without break or punctuation marks, the location and form of the words being the only indications of the meaning. The use of space and marks was adopted very slowly, but mostly since the beginning of the sixteenth century, and in the rolls of parliament the words are never, not to this day, punctuated, and punctuation is not allowed to throw light on the printed statutes of England, nor has punctuation arrived at perfection any where. Barrow v. Wadkins, 24 Beav. 327-330; Albright v. Payne, *supra*, p. 14. Nor should a construction be founded upon a mere grammatical criticism which is never received to change or control the intention of the legislature, and a comma may be removed and placed before a word or placed after a word, nor should a comma be construed by the learned commissioner as an interpolation as held in the second paragraph of the syllabus in Sager v. Summers, and besides this respectable array of authorities we quote the syllabus in Jerome H. Sager v. Charles E. Summers, assignee. "2. The comma after the work acknowledged, in the fourth line of section 6, chapter 6, compiled statutes, is an interpolation." And does it need further comment from us to say that even after the motion for rehearing was filed, the above syllabus was declared to be, and left standing as the law of Nebraska in that case, when disputed by authorities of the highest kind, both ancient and modern, and that a comma was never before held by any court to be an interpolation or received as an interpretation of a statute, unless the comma appeared in the place where the court thought it ought to be, and in neither of the cases, Lancaster County Bank v. Horn or Deere v. Losey, did the courts in their opinion refer to a comma or place a construction upon the statute of that reason.

In Albright v. Payne, *supra*, it is held and there are no authorities against this rule of construction of a statute and that it should not be founded upon a mere bad spelling or grammatical criticism. Who ever heard as a matter of practial experience that the legislative intent could be determined by a comma or punctuation mark? As a matter of fact the individual members never see the bill that is finally passed. It is read to them by a clerk, amid the usual noise and confusion of such bodies, almost two-thirds of them do not hear what is read of most all the bills, but rely upon the public printer who get up what is supposed to be the copies of each bill which is laid upon their table, and the public printer puts in the commas, stops and rests wherever in his judgment the same are needed, and according to his education or experience. But the words of the bill are there and from them the true meaning is gathered, and if the printer puts a comma in the right place the courts will of course permit it to remain where it is, but if it is in the way of the true interpretation the courts will not hesitate to strike it out, and put it where it ought to be. This we believe to be the law, and in the next case coming to the Supreme Court of Nebraska it will so hold, but under the peculiar courtesy granted toward a bad opinion by most courts of last resort a motion for a rehearing pointing out such errors, are as a rule promptly overruled, which was done in the above case. I desire to refer to a French case that seems to be squarely in point. A very wealthy Frenchman died leaving 2,500,000 franc which he intended by his last will and testament to leave to his two children, 2,000,000, and to a certain charitable institution 500,000 franc, but in drafting his will he unfortunately used the French word "D'eux" which with the inverted comma after the letter D means, in our language, "of them," but in the French language the same word without the inverted comma, Deux, means "two," and by the unfortunate language used in his will by his attorney there seemed to be a very grave doubt after his death, whether his children was each to receive 500,000 franc and the charitable institution 1,500,000 franc, or 1,000,000 franc each, and everything depended whether the inverted comma after the letter D, was or was not used by the testator, and one of the fiercest lawsuits grew out of the premises that France had seen in many a day, but finally the court of last resort in that county rendered its decision holding, following the idea in the opinion in the Nebraska case, that the comma after the letter D was placed there by the testator, and his two children could only take under the will 1,000,000 franc and the charitable institution 1,500,000 franc. But after all the courts of France had decided the case, one of the children took the will to a chemist who analyzed the inverted comma and found it to be nothing but a fly speck. The rule of construction laid down in the French case and Sager v. Summers are illustrated by the following: For many years in Nebraska one of our Chief Justices had been a very hard worker, and had written many books upon Practice, Pleadings and Criminal Law, and finally at the close of a term of the supreme court, many years ago, he brought to one of the clerks of the supreme court the original manuscript of his great work on Criminal Law, and said to him, "you

know how busy I am; here is this armful of opinions I must write—I must also deliver a lecture next week before the law school—and you know my dear Wheeler how anxious the public are for this work on Criminal Law, will you not punctuate this manuscript for me, and by the way put in plenty of interrogation points, they look the prettiest." Hence I repeat that the motion for rehearing was denied through courtesy, and that the opinion in Sager v. Summers will be overruled, and the two cases of Lancaster County Bank v. Horne and Deere v. Losey, being by far the better rule, will be reaffirmed.

Lincoln, Neb. L. C. BURR.

BOOK REVIEWS.

INDEX DIG. AMER. & ENG. ENCYCLOPEDIA OF LAW. These two large volumes contain an admirable index-digest of the entire series of twenty-nine volumes, known as the Amer. & Eng. Encyclopedia of Law. They form a fitting close to so useful a set of books. In point of substance it may be said that they are in every respect what an index and digest should contain, being a comprehensive presentation in alphabetical detail of every subject and point treated and discussed in the volumes preceding. They are well arranged for ready search, and in point of type and printing entirely satisfactory. The series is published by Edward Thompson Co., Northport, L. I.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADVERSE POSSESSION — Barren Lands. — Adverse possession of unproductive lands, consisting of barren sand hills cut up by sloughs, is shown by recording the deed under which the occupant claims, cutting all the timber of any value thereon, having the land surveyed and boundary lines grubbed out and staked, going upon the land at intervals, claiming absolute ownership, clearing a small portion, building a brush fence around the portion cleared, employing agents in the neighborhood of the land to look after it, and paying taxes, without proof of actual occupation.—WORTHLEY V. BURBANKS, Ind., 45 N. E. Rep. 779.

2. APPEAL—Supersedeas.—Where six separate lots on the same street are assessed for the same improvement, the owner cannot, by appealing from the assessment as to four of the lots, suspend proceedings to collect the assessment against the other two.—CITY OF PITTSBURGH V. MAXWELL, Penn., 36 Atl. Rep. 158.

3. ASSUMPSIT—Money Had and Received.—*Assumpsit* for money had and received will lie against persons to whom money belonging to the estate of plaintiff's intestate has been paid over, and who are not justly entitled to retain it.—WILSON V. TURNER, Ill., 45 N. E. Rep. 820.

4. ATTACHMENT—Action on Bond.—In an action on an attachment bond, where the answer is a general denial of the averments of the petition, the burden is upon the plaintiff to show that the attachment was wrongfully issued; that is, that the averments in attachment affidavit, as ground for the writ, were untrue.—STORZ V. FINKELSTEIN, Neb., 69 N. W. Rep. 856.

5. ATTACHMENT—Levy.—It is a requirement of a valid levy upon personalty that the officer take such actual and exclusive possession as the nature of the property will permit. Constructive possession of a species of property admitting of actual and exclusive possession is insufficient as against a chattel mortgagee of such property who obtains such possession without committing a trespass or a fraud.—GARDNER V. ANTHONY NAT. BANK, Kan., 47 Pac. Rep. 516.

6. ATTACHMENT — Validity.—An attachment on the ground of a disposition of property by the debtor with intent to defraud creditors can only be sustained by proof of an actual intent to defraud; and while an assignment previously made is admissible in evidence on a motion to discharge the attachment, the validity of such assignment is not involved on such hearing. Whether valid or invalid, it can only be considered as bearing on the question of actual intent.—GERMAN BANK V. FOLDS, S. Dak., 69 N. W. Rep. 823.

7. BANKS AND BANKING—Collections—Checks—Negligence.—A customer's bank check is not intended for circulation as a medium of exchange, and should be presented for payment with the dispatch, consistent with the circumstances of the case and the transaction of other commercial business.—WESTERN WHEELED SCRAPER CO. V. SADILEK, Neb., 69 N. W. Rep. 765.

8. BENEVOLENT SOCIETY.—It is competent for a fraternal organization, which provides for the payment of benefits, to make reasonable rules or laws requiring those claiming benefits to submit their claims to designated officers or tribunal of the organization for investigation and allowance before the claims are made the subject of litigation in the courts; but a requirement of this kind does not abridge the right of members to resort to the courts when their claims have been submitted to and finally rejected by such officers and tribunals.—SUPREME LODGE OF ORDER OF SELECT FRIENDS V. RAYMOND, Kan., 47 Pac. Rep. 533.

9. BENEVOLENT SOCIETY — Insurance.—Under a by law of a society providing that "a member who shall finding himself incapable of working by reason of

sickness or accident shall receive the sum of $5 per week," a member who becomes totally blind as the result of a disease produced by an accidental injury to one of his eyes is entitled to the weekly benefits.—MOGE V. SOCIETE DE BIENFAISANCE ST. JEAN BAPTISTE, Mass., 45 N. E. Rep. 749.

10. BILLS AND NOTES—Accommodation Paper.—Accommodation paper is put into circulation for the purpose of giving credit to the party for whose benefit it is intended, and, although he cannot maintain an action upon it against the accommodation maker or indorsers a purchaser can do so, who acquires it while still current, and gives the credit it was intended to promote, although with knowledge of its original character.—ISRAEL V. GALE, U. S. C. C. of App., Second Circuit, 77 Fed. Rep. 532.

11. BILLS AND NOTES—Bona Fide Purchasers.—Where the payee of a negotiable promissory note indorses and delivers the same to his debtor to secure the payment of a debt owing to him, such debtor becomes an innocent holder of said note, and acquires a lien thereon for the amount of his debt, provided he took it before maturity, and without notice of any defenses thereto.—JONES V. WIESEN, Neb., 69 N. W. Rep. 762.

12. BILLS AND NOTES—Discount of Note.—Held, following Becker's Inv. Ag. v. Rea (Minn.), 65 N. W. Rep. 928, that whether the discounting of a bill or note, with the general indorsement of the holder, is a sale of the paper, or a loan to the holder, secured by the paper and indorsement as collateral, is ordinarily a question of fact.—STOLZE V. BANK OF MINNESOTA, Minn., 69 N. W. Rep. 813.

13. BILLS AND NOTES—Forgery of Note—Ratification.—Failure of one, when shown a note indorsed with his name, to at once repudiate the genuineness of the signature, while evidence, in the nature of an admission on the question whether he assumed the signature as his own, is not conclusive; he having received no benefit from the forgery, and the forger not being his agent for any purpose.—TRADERS' NAT. BANK V. ROGERS, Mass., 45 N. E. Rep. 923.

14. BILLS AND NOTES—Overdue Interest on Note.—An overdue and unpaid installment of interest, known to the indorsee at the time of purchase, dishonors negotiable paper, and renders it subject, in the hands of the purchaser, to existing defenses between the original parties, the same as an overdue and unpaid installment of principal.—FIRST NAT. BANK OF WAVERLY, IOWA, V. FORSYTH, Minn., 69 N. W. Rep. 909.

15. BILLS AND NOTES—Usurious Interest.—Where a party obtains a loan of $500 and there is included in the note given for said loan an amount of usurious interest, and there are paid thereon afterwards certain amounts by way of usurious interest, in a suit on the note given in renewal of said loan, the makers of the note are entitled to have deducted from said note all moneys paid thereon by way of usurious interest.—NEW HAMPSHIRE BANKING CO. V. WALLER, Kan., 47 Pac. Rep. 543.

16. BOUNDARIES—Plat Implies a Survey—Evidence.—A map or plat of a town site or addition implies that it is based on a survey made on the ground; and one claiming under a deed describing lots by reference to such plat may show the existence of stakes indicating the lines as marked by the surveyor.—BURKE V. MCOWEN, Cal., 47 Pac. Rep. 367.

17. BUILDING ASSOCIATIONS—Insolvency.—When, by reason of losses, there was such a deficiency in the assets of a building and loan association that it could not mature its stock, the purposes for which it was organized could not be carried out, and the court proceeded to wind it up, held, this put an end to the contract between it and its members, at least so far as future performance was concerned.—KNUTSON V. NORTHWESTERN LOAN & BUILDING ASSN., Minn., 69 N. W. Rep. 889.

18. CARRIERS—Passengers.—That plaintiff was on defendant's train by the "invitation and permission of the conductor" does not render him a passenger, so as to entitle him to recover as a passenger for injuries received.—STALCUP V. LOUISVILLE, N. A. & C. RY. CO., Ind., 45 N. E. Rep. 802.

19. CARRIERS — Passenger — Ejection from Train.—Where a person who has a ticket, purchased from a company engaged in the business of a common carrier of passengers, entitling him to be carried from a certain station to another on the line of its road, which is good only on trains stopping at his destination, is, by the fault of the company's station agent, induced to take a train that does not, under the schedule, stop at such place, and, as a consequence, is ejected by the conductor on calling for his ticket, and before reaching his destination, such facts show a right in the passenger against the company to recover as for a tort, and not merely for a breach of contract.—PITTSBURGH, ETC. RY. CO. V. REYNOLDS, Ohio, 45 N. E. Rep. 712.

20. CERTIORARI—Amendment of Judgment.—*Certiorari* will lie to review the action of a county court in amending a judgment entry by a *nunc pro tunc* order after the time for an appeal or proceedings in error from the judgment has expired.—PEOPLE V. COUNTY COURT OF ARAPAHOE COUNTY, Colo., 47 Pac. Rep. 469.

21. CHATTEL MORTGAGE—Foreclosure before Maturity of Debt.—Though a chattel mortgage authorizes the mortgagee to take possession of the mortgaged property at any time he may choose, and to sell sufficient of the same to pay the debt secured, where it also contains a provision that on payment of such debt according to the tenor of the notes given for the same the mortgage shall be void, the mortgagee is not authorized to sell the property in advance of the maturity of the debt, or some part thereof, until which time the mortgagor's equity of redemption does not expire.—KOSTER V. SENEY, Iowa, 69 N. W. Rep. 868.

22. CHATTEL MORTGAGE — Validity.—A chattel mortgage executed before, but not filed of record until after, the mortgagor makes an assignment under the insolvency law for the benefit of his creditors, is void as to such creditors. — SHAY V. SECURITY BANK OF DULUTH, Minn., 69 N. W. Rep. 920.

23. CHATTEL MORTGAGES—Validity — Corporations.—A chattel mortgage by a corporation, not filed in any public office, is invalid, as against its receiver, or the claims of creditors, after the appointment of the receiver, where possession of none of the property was taken or delivered in virtue of the mortgage.—HEBBERD V. SOUTHWESTERN CATTLE CO., N. J., 36 Atl. Rep. 122.

24. CONFLICT OF LAWS—Insurance Policies.—One W, an insurance broker, residing in Missouri, with the assent of plaintiff, also a resident of Missouri, wrote to the agent of defendant insurance company at St. Paul, Minn., asking him to place insurance upon certain real estate of plaintiff in Minnesota. The agent forwarded the application to defendant, at its home office in Connecticut. It was accepted, and a policy forwarded to be countersigned by the agent at St. Paul, who forwarded it to W, in Missouri, to be delivered to plaintiff, if acceptable; and it was delivered to and accepted by plaintiff, in Missouri. The policy was conspicuously indorsed, "Minnesota Standard Policy," and contained a clause requiring the counter signature of the agent at St. Paul to its validity, and also provisions which were valid by the law of Minnesota, but void under those of Missouri: Held, that the parties must be deemed to have intended to contract with reference to the laws of Minnesota, and the policy was accordingly a Minnesota, and not a Missouri, contract.—GIBSON V. CONNECTICUT FIRE INS. CO., U. S. C. C., E. D. (Mo.), E. D., 77 Fed. Rep. 561.

25. CONFLICT OF LAWS — Penal Statutes.—Penal statutes have no extraterritorial force, and the courts of this State will not enforce the penal statutes of another State or territory.—DALE V. ATCHISON, T. & S. F. R. CO., Kan., 47 Pac. Rep. 521.

26. CONSTITUTIONAL LAW — Jury Trial — Excessive Damages.—Act May 20, 1891, in authorizing the su-

preme court to reverse for excessive damages, does not violate Const. art. 1, § 6, declaring that "trial by jury shall be as heretofore and the right thereof remain inviolate." — SMITH v. TIMES PUB. CO., Penn., 36 Atl. Rep. 296.

27. CONSTITUTIONAL LAW—Mixed Schools. — Section 8 of article 12 of the constitution of this State, which provides that "white and colored persons shall not be taught in the same school," is not repugnant to section 1 of the fourteenth amendment to the constitution of the United States. — MARTIN v. BOARD OF EDUCATION, W. Va., 26 S. E. Rep. 348.

28. CONTEMPT — Jury Trial. — A party charged with contempt for the violation of an injunction allowed in a civil proceeding to abate and enjoin a public nuisance is not of right entitled to a jury trial.—STATE v. LINKER, Kan., 47 Pac. Rep. 570.

29. CONTRACT — Consideration.—A promise to renew a note to be given by a debtor in payment of a past-due debt is without consideration.—AREND v. SMITH, N. Y., 45 N. E. Rep. 872.

30. CONTRACT — Lease — Written and Printed Provisions.—Effect is to be given to both the written and printed provisions of a contract where they are consistent with each other, and a printed clause in a lease, providing that a failure on the part of the lessee to perform any of the covenants therein contained shall authorize a re-entry and recovery of the premises by the lessor, applies to a written provision that the lessee shall pay all taxes on the property before they become delinquent. — HEIPLE v. REINHART, Iowa, 69 N. W. Rep. 871.

31. CONTRACTS—Sureties — Estoppel.—Where a building contract provides that final payment of the price shall be made only when the work is completed and a written release of mechanics' liens is furnished the owner, and the latter, at the special request of the surety on said contract, makes final payment when the work is practically finished, without demanding such release, the surety is estopped from setting up that fact in defense of an action by the owner to recover the amount paid by him for liens filed after completion of the building. — SLICKER v. SCHUCKERT, Penn., 36 Atl. Rep. 205.

32. CONVERSION OF MORTGAGED PROPERTY. — Where goods were wrongfully taken from the possession of the mortgagor before condition broken, by a third person, and the mortgagor recovers their full value in conversion, on payment into court of the amount of a judgment so recovered, the defendant may maintain a bill in equity to enjoin the prosecution of a second action for the conversion by the mortgagee, and to require him to resort to the money paid in satisfaction of the judgment in the former suit in lieu of the property.—FIELD v. EARLY, Mass., 45 N. E. Rep. 917.

33. CORPORATION — Alien Corporation — Mortgage.—Where an alien corporation has made a loan, secured by a mortgage on land in the State, the taking of a direct deed from the mortgagor in satisfaction of the debt, without foreclosure, is not prohibited by Const. art. 2, § 33 (given effect by Gen. St. § 1524), which provides that "the ownership of lands by aliens is prohibited in this State, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debt; every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien, for the purposes of this prohibition."—OREGON MORTG. CO. v. CARSTENS, Wash., 47 Pac. Rep. 421.

34. CORPORATIONS — Dividend — Evidence.—A stockholder in a corporation cannot prove the voting of a dividend by parol, in contradiction of the records of the company, his remedy, if the record is incorrect, being by proceedings for its correction. — DENNIS v. JOSLIN MANUFG. CO., R. I., 36 Atl. Rep. 129.

35. CORPORATIONS — Foreign Corporations—Enforcement of Stockholders' Liability.—Liability of a stockholder of a foreign corporation under the statutes of the foreign State to a creditor of the corporation, not being alleged to be contractual, or to be so held by the courts of that State, cannot be enforced in Massachusetts.—COFFING v. DODGE, Mass., 45 N. E. Rep. 928.

36. CORPORATIONS — Fraudulent Issue of Stock.—Where stock is issued by a *de facto* board of directors of a corporation, on the heels of a disputed election, followed by *quo warranto* proceedings, which resulted in ousting them, and a majority of the stock so issued is purchased by the *de facto* officers, without the consent of the other stockholders, to enable them to secure a majority of the entire stock, and thereby control future elections, an interlocutory order, in proceedings to enjoin the issuance of such stock, restraining the *de facto* officers from voting the stock so issued and held by them, and from voting a corresponding number of votes on their old stock to the amount of the new issue transferred by them to *bona fide* purchasers, is not erroneous.—MORRIS v. STEVENS, Penn., 36 Atl. Rep. 151.

37. CORPORATIONS — Insolvency — Preferences. — An insolvent corporation may prefer creditors, though the preference also inures to the benefit of some of its directors as sureties on the indebtedness preferred. —LEVERING v. BIMEL, Ind., 45 N. E. Rep. 775.

38. CORPORATIONS — Mortgages—Directors.—A mortgage by an insolvent corporation to secure *bona fide* indebtedness is not invalid, as against a director voting in favor thereof, though such mortgage inures to the benefit of other directors, who were also secondarily liable on the indebtedness, and whose votes were necessary to the passage of the resolution authorizing the mortgage.—LUCAS v. FRIANT, Mich., 69 N. W. Rep. 735.

39. CORPORATIONS — Power to Contract. — Although, where a corporation is invested by its charter with power to enter into a contract, on certain antecedent conditions, it is sufficient, in declaring thereon, to aver the making of a contract, yet, if it be apparent, from the face of the plaintiff's pleading, taken as a whole, that the antecedent conditions were not in fact fulfilled, such pleading will be demurrable. — FOREST v. ST. FRANCIS LEVEE DIST. OF MISSOURI, U. S. C. C., E. D. (MO.), E. D., 77 Fed. Rep. 555.

40. CORPORATION — Sole Stockholder—Right to Sue.—The mere fact that one has become the sole owner of the stock of a private corporation does not entitle him to sue in his own name on an account stated. He must aver and prove his succession to the interests of the corporation. — RANDALL v. DUDLEY, Mich., 69 N. W. Rep. 729.

41. COUNTIES — Quo Warranto.—Annexation of Territory.—An information in the nature of *quo warranto*, brought by the attorney-general, will lie against a county to oust it from adjoining territory illegally annexed to the county, and over which the county has assumed jurisdiction.—STATE v. BOARD OF COMRS. OF CROW WING COUNTY, Minn., 69 N. W. Rep. 925.

42. COVENANT OF SEISIN — Damages.—On a partial breach of the covenant of seisin, where the possession of the covenantee has never been disturbed, as a general rule, subject to certain exceptions, he will be entitled to recover as damages that proportion of the whole consideration (without interest) which the part lost bears to the full title attempted to be conveyed.—BOLINGER v. BRAKE, Kan., 47 Pac. Rep. 537.

43. CRIMINAL EVIDENCE — Conspiracy.—In a joint trial of two defendants for conspiring to commit a crime, testimony voluntarily given by one defendant on his preliminary examination, and taken down, is admissible against him.—PEOPLE v. BUTLER, Mich., 69 N. W. Rep. 734.

44. CRIMINAL EVIDENCE—False Pretenses.—In a trial for obtaining goods under false pretenses, a paper taken from defendant's person is admissible in evidence for the purpose of showing that defendant had devised a scheme to obtain goods whenever and from whomsoever he could, where the paper was in his own handwriting, and was addressed "to all whom it may

concern," and contained the same false statements he was charged with in the indictment, though it was not used in obtaining the goods in the particular case, and was dated subsequent thereto.—CARNELL V. STATE, Md., 36 Atl. Rep. 117.

45. CRIMINAL LAW—Arson — Warrant.—A warrant alleging that defendant, "with force and arms," did set fire to and burn a certain mill, "contrary to the form of the statute," etc., and referring to the act as a "felony," is sufficient, though it does not charge a "willful and malicious" burning, in the terms of How. Ann. St. § 9125, under which the warrant was drawn.—PEOPLE V. PICHETTE, Mich., 69 N. W. Rep. 739.

46. CRIMINAL LAW—Competency of Juror.—A verdict will not be set aside on the ground of the incompetency of a juror unless it is shown that the moving party did not know of the ground of challenge when the jury was impaneled.—BUSEY V. STATE, Md., 36 Atl. Rep. 257.

47. CRIMINAL LAW—Embezzlement by Agent.—A person employed by an express company to take charge of its business at a local office, who receives and consigns express matter, collects charges thereon, keeps an account of the business of the office, makes reports thereof, and transmits balances of moneys received to the company for a commission on the receipts of the office, and is not bound to devote his whole or any particular portion of his time to the business of his employer, is an agent, within the meaning of the second clause of section 88 of the act regulating crimes and punishments, and may be charged with and convicted of embezzlement thereunder.—STATE V. SMITH, Kan., 47 Pac. Rep. 585.

48. CRIMINAL LAW—Forgery — Wife's Testimony.—In a trial for forgery of a note, the testimony of defendant's wife was competent to show that he took her by the neck, and led her into their bedroom, where he made her sign the name to the note as he spelled it for her; such acts not being confidential communications.—BEYERLINE V. STATE, Ind., 45 N. E. Rep. 773.

49. CRIMINAL LAW—Intent.—In a criminal case, where the intention of the accused is a material fact, and he takes the stand on his own behalf, he may be asked directly what was his intention with regard to the act complained of.—CUMMINGS V. STATE, Neb., 69 N. W. Rep. 756.

50. CRIMINAL LAW — Larceny — Possession of Stolen Goods.—Evidence that stolen goods were found in defendant's bedroom, in the drawer of a bureau, containing only men's clothing, in a purse under a paper covering the bottom of the drawer, is sufficient to show a conscious, exclusive possession by defendant, a man, though the room was also occupied by two women, especially where defendant, when arrested, was in the company of another man, charged to be his confederate, on whom a portion of the stolen goods were found.—PEOPLE V. WILSON, N. Y., 45 N. E. Rep. 862.

51. CRIMINAL LAW — Public Officers — Profits Out of Public Funds.—A city treasurer, who knowingly receives and appropriates to his own use interest on funds of the city deposited in bank, may be indicted, under Pen. Code, § 57, making it a felony for a public officer, in any manner not authorized by law, to use money intrusted to his safe-keeping, in order to make a profit therefrom, or to use the same for any purpose not authorized by law.—STATE V. BOGGS, Wash., 47 Pac. Rep. 417.

52. CRIMINAL LAW—Rape.—An indictment for rape is defective that does not charge the felonious intent accompanying the act; the qualification merely of the assault as felonious will not suffice.—STATE V. PORTER, La., 21 South. Rep. 125.

53. CRIMINAL LAW—Swindling — Value.—In determining the value of the property obtained by defendant by the swindle, to fix the grade of the offense, it appearing that defendant induced prosecutor to sell to him a horse by fraudulent representations, the amount paid by defendant is to be deducted from the value of the horse.—GASKINS V. STATE, Tex., 38 S. W. Rep. 470.

54. CRIMINAL LIBEL.—A false and malicious publication, in print or writing, which tends to injure the reputation of another person, or to bring him in contempt, hatred, or ridicule, is libelous, and the publisher is amenable to the criminal law.—RAKER V. STATE, Neb., 69 N. W. Rep. 749.

55. DECEIT — Fraud — Representations.—False representations, by the owner of a stock of goods, that the stock cost him a certain sum, made to another to induce him to enter into partnership with the former, and take one-half the stock at such valuation, are not mere expressions of opinion as to value.—HARLOW V. LA BRUM, N. Y., 45 N. E. Rep. 859.

56. DEED — Consideration.—An agreement recited that the grantor let to the defendant a farm on certain conditions. The agreement then provided that, if the defendant should strictly comply with the conditions above stipulated, and at the request of the grantor and his wife do such work as shall be necessary to be done for them, such as furnishing fuel, provisions, nurses, and care in sickness, they "do hereby grant to him [the defendant] one day after my and my wife's death, the farm or tract of land described in the agreement, his heirs and assigns, forever:" Held, that the instrument is a valid present grant of lands, and not a mere lease.—FRITZ V. MENGES, Penn., 36 Atl. Rep. 218.

57. DEED—Consideration of Marriage.—A deed made in accordance with an antenuptial contract is supported by a sufficient consideration where the grantor and grantee had the ceremony of marriage performed, and lived as husband and wife up to the time of grantor's death in the belief that the husband of the grantee was dead, he having deserted her 12 years before, even though such former husband was living during the period of the supposed second marriage.—OGDEN V. MCHUGH, Mass., 45 N. E. Rep. 731.

58. DEED— Covenants — Building Restrictions.—The use of a dwelling house as an asylum in which to treat patients for the liquor, opium, tobacco, and morphine habits is not a violation of a provision in the deed thereof that "no building other than one single dwelling house shall be erected, placed, or maintained on said lot," since doubts should be resolved in favor of the grantee, when the meaning is not plain.—STONE V. PILLSBURY, Mass., 45 N. E. Rep. 768.

59. DEED — Covenant against Incumbrances.—A covenant against incumbrances in a conveyance of land, is, in effect, that the premises then are free from incumbrances; and, if any incumbrances exist, the covenant is broken, and a cause of action therefor accrues in favor of the covenantee, which will be barred by limitation in five years.—BELLAMY V. CHAMBERS, Neb., 69 N. W. Rep. 770.

60. DEED—Estoppel.—W, one who had been a member of the Kickapoo tribe of Indians, became a citizen of the United States, and thereafter executed a deed of conveyance, with the general covenants of warranty, for certain Indian lands in which he had an interest, but not the legal title, to one L, not an Indian, and to whom a conveyance of such lands was at the time not authorized by law. Subsequently, the legal title to said lands becoming vested in W with full power of conveyance, he executed another deed for the same to N, who took with notice of the prior deed: Held, that W and his second grantee were estopped from setting up a title adverse to that attempted to be conveyed by the deed to L.—LETSON V. ROACH, Kan., 47 Pac. Rep. 321.

61. DIVORCE — Attorney's Fees—Lien.—Under section 12, ch. 25, Comp. St., the allowance of attorney's fees to the counsel of the wife is ancillary to or an incident of the action for divorce, and a separate suit cannot be maintained against the husband by such attorney to recover for his professional services there rendered to the wife.—YEISER V. LOWE, Neb., 69 N. W. Rep. 847.

62. ELECTIONS — Ballots — State Supervisor of Elections.—It is the imperative duty of the secretary of State, as the State supervisor of elections, to send to the deputy supervisors the form of ballot to be used at an approaching election immediately upon the ex-

piration of the time allowed for correcting certificates of nomination.—STATE v. TAYLOR, Ohio, 45 N. E. Rep. 715.

63. EQUITY — Money Demand.—The courts of the United States sitting in equity have jurisdiction to enforce a demand for money only, unless there be an acknowledged debt, or one established by a judgment rendered, accompanied by an interest in the debtor's property or a lien thereon, created by contract or by some distinct legal proceeding.—GREENWOOD, A. & W. RY. v. STRANG, U. S. C. C., D. (S. Car.), 77 Fed. Rep. 498.

64. EQUITY — Stock Subscription.—The fact that a resolution of the board of directors of a corporation under which a stockholder claims release from liability on his subscription is alleged to be fraudulent and void, will not give equity jurisdiction of a bill against the stockholder to collect the subscription. The invalidity of the resolution must be shown at law.—SIGUA IRON CO. v. CLARK, U. S. C. C., E. D. (Penn.), 77 Fed. Rep. 496.

65. ESTATES — Life Tenant—Oil Lease.—Oil and gas are a part of the realty, and therefore a life tenant of lands has no authority to lease lands on which there had not theretofore been any oil or gas operations, with right to the tenant to extract oil or gas therefrom.—MARSHALL v. MELLON, Penn., 36 Atl. Rep. 201.

66. EXPERT TESTIMONY — Negligence.—In an action for injuries by falling off a bridge, it was error to admit opinions of witnesses as to whether the bridge was dangerous because of the absence of a railing, where the character of the bridge was fully described to the jury.—AUBERLE v. CITY OF MCKEESPORT, Penn., 36 At'. Rep. 212.

67. EXTRADITION—Sufficiency of Complaint.—A complaint, on oath by a duly-authorized officer of Canada, alleged that S had been charged before a justice of the peace of Canada with murder there committed, and a warrant issued for her arrest, the original warrant being attached to the complaint, and that the officer believed the charge as stated in the warrant to be true: Held, sufficient to give the commissioner jurisdiction to issue a warrant for the arrest of S.—EX PARTE STERNAMAN, U. S. D. C., N. D. (N. Y.), 77 Fed. Rep. 595.

68. FEDERAL COURTS—Federal Question—Tax Titles.—A decision of the supreme court of a State denying the validity of an equitable title apparently conveyed by proceedings in the United States land office, and of tax titles based thereon, involves a federal question.—HUSSMAN v. DURHAM, U. S. S. C., 17 S. C. Rep. 253.

69. FIXTURES—Lessor and Mortgagee.—A lessee of a coal mine purchased an electric mining plant, giving the vendor a chattel mortgage thereon to secure the purchase price before it was attached to the realty. The lease gave the lessee the option of purchasing the mine, and the lessor attached as personalty part of the plant: Held that, as between the lessor and mortgagee, the property was personalty.—HEWITT v. GENERAL ELECTRIC CO., Ill., 45 N. E. Rep. 725.

70. FRAUDS, STATUTE OF—Evidence.—Where a bill of goods is marked "O. K." by the agent effecting the sale, proof of custom is inadmissible to show that the letters used implied a guaranty of payment by the agent.—SALOMON v. MCRAE, Colo., 47 Pac. Rep. 409.

71. FRAUDS, STATUTE OF — Express Trusts.—A trust resulting from a conveyance of land, purchased by a wife, to a third person, to protect it from the debts of the husband, the grantee agreeing to reconvey to the wife on payment of a lien on the land for which the grantee was liable, is an express trust, and therefore not enforceable (Rev. St. ch. 59, § 9), unless evidenced in writing.—GODSCHALCK v. FULMER, Ill., 45 N. E. Rep. 809.

72. FRAUDULENT CONVEYANCE.—For creditors to buy property of their debtor, knowing him to be greatly indebted, merely to save their own claim, giving for the property their claim, which is a sufficient consideration, is not fraudulent.—FEDER v. ERVIN, Tenn., 38 S. W. Rep. 447.

73. FRAUDULENT CONVEYANCE—Chattel Mortgage.—A chattel mortgage on a retail stock of goods provided that the mortgagor should sell the goods in the regular course of business, and apply the proceeds in keeping up the stock and defraying the expenses of running the business, and that all of the balance of the proceeds should be paid to the mortgagee, to be applied on the mortgage indebtedness: Held, the mortgage was, on its face, fraudulent and void as to the creditors of the mortgagor.—PABST BREWING CO. v. BUTCHART, Minn., 69 N. W. Rep. 809.

74. FRAUDULENT CONVEYANCES — Possession.—Fraud in the sale of a stock of merchandise, as against an execution creditor of the seller, is not shown by the fact that the seller and his former clerk remained in the store selling goods, and that the seller's name on the window blinds, which had constituted the only sign, was not changed, and that the license of the seller was not transferred to the buyer, where the bill of sale was recorded, the sale advertised for a week in a newspaper in the city, and possession of the goods taken by the buyer.—BENJAMIN v. MADDEN, Va., 26 S. E. Rep. 392.

75. GAMING—Recovery of Money Paid.—A member of a club, interested in the "takeout" from all bets made in a poker game played in the clubrooms, to the extent that such takeout is used in paying the expenses of the club, and purchasing drinks and meals for the members, is a participant in the game, though not an actual player, so as to prevent his recovery for money paid out at the request of another member in settlement of his losses at the game.—WHITE v. WILSON'S ADMRS., Ky., 38 S. W. Rep. 495.

76. GARNISHMENT — Answer.—An answer by a garnishee, acknowledging that he had executed a note to defendant, but alleging that the note had been transferred to a *bona fide* purchaser, without stating the name of the purchaser, is sufficient to prevent judgment absolute against him.—MCCALLUM v. MORRIS, Penn. 36 Atl. Rep. 231.

77. GARNISHMENT — Disclosure of Garnishee.—The "disclosure" of the garnishee is competent evidence in favor of a "claimant," and against the plaintiff, for the purpose of showing what property had been impounded by the garnishee proceedings, and thus identifying it as the same property to which the claimant is asserting a right.—BRADLEY v. THORNE, Minn., 69 N. W. Rep. 909.

78. GIFT—Mortgage — False Representation.—A husband made a gift of real estate to his wife with the understanding that at her death the fee should go to his son, and to accomplish this he conveyed the fee to his wife, through a trustee, and induced her to sign a mortgage in trust for the son, by representing that it was a deed of trust to secure the fee to the son at her death: Held that, as it was the donor's intention that his wife should not be disturbed by the mortgagee during her life, the mortgage accomplished the same result as would a deed of trust, and was not void for fraud.—HAYS v. HAYS, Penn., 36 Atl. Rep. 311.

79. GUARANTY — Contract of Agency — Alteration.—A guarantor of the faithful performance by an agent of a contract of agency within a certain county, the guaranty providing that the contract may be modified by an agreement in writing between the principals, is released from future liability by the subsequent extension of the agent's territory without any written agreement.—PLUNKETT v. DAVIS SEWING-MACH. CO., Md., 36 Atl. Rep. 115.

80. HABEAS CORPUS—Conviction of Crime.—Where a prisoner, seeking to be discharged on *habeas corpus*, shows in his petition for the writ that his imprisonment is under and by virtue of judgment of a court, competent to try the offenses for which he is imprisoned, directing him to be imprisoned on conviction of such offenses, it is necessary for him, in order to entitle himself to his discharge, to show the nullity of such judgment, or that he has served the sentence pronounced by it.—IN RE GREENWALD, U. S. C. C., N. D. (Cal.), 77 Fed. Rep. 590.

81. HOMESTEAD.—Under the law of this State the homestead of a deceased head of a family residing in this State does not go into the hands of the administrator of his estate as assets for the payment of debts. It descends to the heirs, subject to the dower of the widow (when there is a widow), on the death of the ancestor. The administrator should not be charged with services of a laborer employed by the widow to care for and improve the homestead of the deceased, and to make crops for such widow thereon. —HEDICK V. HEDICK, Fla., 21 South. Rep. 101.

82. HOMESTEAD — Effect of Execution Sale.—Under the established rule that a homestead right cannot be asserted by a surety on an official bond, executed before the enactment of the homestead law, as against a demand originating in a default of the principal in such bond, the right of the widow of such a surety to a homestead in his lands is not defeated by their sale under a judgment on the bond, where no deed was ever issued thereon to the purchaser, such deed being indispensable to a valid transfer of title by the sale; nor is her right affected by a conveyance by her husband to the purchaser or his grantee, in which she did not join.—GROSS V. WASHINGTON, Tenn., 38 S. W. Rep. 442.

83. HOMESTEAD—Husband and Wife.—Under the statute of this territory in force in 1891 (St. 1890), exempting a homestead to each head of a family, a wife was not entitled to a homestead out of her own land, nor was the husband entitled to a homestead in lands belonging to his wife.—MCGINNIS V. WOOD, Okla., 47 Pac. Rep. 492.

84. HOMESTEAD — Rights of Widow and Children.—Where the widow and children of a deceased debtor receive the proceeds of a life policy taken out by decedent for their benefit, they may, as against the creditors, claim a homestead in such fund, though some of the premiums were paid by decedent while he was insolvent.—MAHONEY V. JAMES, Va., 26 S. E. Rep. 394.

85. HUSBAND AND WIFE — Conveyances Between.—A deed from a husband to his wife for a valuable consideration, receipt of which is acknowledged, is valid, as between the parties and their heirs, where the rights of creditors are not involved.—REAGLE V. REAGLE, Penn., 36 Atl. Rep. 191.

86. HUSBAND AND WIFE — Non-residents—Contract.—While a husband and wife were domiciled in North Carolina, the wife took steps which, under the North Carolina statutes, gave her the right to contract as a *feme sole*, with her husband as well as with others, and she afterwards released her dower in her husband's lands. In consideration of this release, and for other adequate considerations, the husband executed a covenant to her to surrender all his marital rights in certain lands owned by her in Massachusetts: Held, that the validity of the contract, and the competency of the wife to receive the covenant, were to be determined by the law of North Carolina.—POLSON V. STEWART, Mass., 45 N. E. Rep. 737.

87. HUSBAND AND WIFE — Partition.—Where a wife becomes interested as a copartner in a tract of land, inheriting the same from her deceased father, her husband, if he is entitled to curtesy by reason of issue of the marriage, can make a valid partition of the land with the other heirs of the decedent, either by written agreement, or by parol, or partly by writing and partly by parol.—ARNOLD V. BUNNELL, W. Va., 26 S. E. Rep. 359.

88. HUSBAND AND WIFE—Resulting Trust.—A wife has no equitable interest in land conveyed to her husband merely because one-half the price is paid by her father as an advancement to her, where he knew the land was to be conveyed to the husband alone.—LEWIS V. STANLEY, Ind., 45 N. E. Rep. 693.

89. HUSBAND AND WIFE—Wife's Personal Estate.—Acts 1864 making the will of a married woman as to personalty as valid as if she were single, does not affect the husband's right to personal property in respect to which the wife dies intestate.—NELSON V. NELSON, N. J., 36 Atl. Rep. 280.

90. INJUNCTION—Laches.—Where a corporation, authorized to build and maintain a bridge over a river from a point previously appropriated by a ferry company under its charter, erects the structure directly across the line of the ferry, the ferry company cannot, after the bridge company has made large expenditures, enjoin it from completing and operating the bridge, but is only entitled to damages.—RIVERTON FERRY CO. V. MCKEESPORT & D. BRIDGE CO., Penn., 36 Atl. Rep. 186.

91. INSURANCE—Arbitration Clause—Revocation.—A provision in a policy for submission of the amount of any loss to arbitration by persons to be chosen by the parties is revocable.—YOST V. MCKEE, Penn., 36 Atl. Rep. 317.

92. INSURANCE—Assignment.—Where a policy of fire insurance provides that the policy shall be avoided by an assignment of it without the consent of the company, and the policy is written and indorsed for the benefit of a mortgagee, such condition will not be held to apply to the mere delivery of the policy to an assignee and subsequent holder of the mortgage, and such assignee of the mortgage at the time, the loss occurred, may claim the benefit of the insurance.—SUN FIRE OFFICE OF LONDON V. FRASER, Kan., 47 Pac. Rep. 327.

93. INSURANCE—Conditions.—A provision in a policy of insurance that "this entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," is valid, and enforceable, when not waived or abrogated in any manner.—COMMERCIAL UNION ASSUR. CO. V. NORWOOD, Kan., 47 Pac. Rep. 529.

94. INSURANCE—Conditions in Policy.—A policy containing a condition that it shall be void "if the subject of insurance be on ground not owned by the insured in fee-simple" is not vitiated by the fact that the insured had not received a deed from his vendor, though he had paid the price in full, where the insured was asked no questions concerning the title, and made no representations relative thereto with the intent to deceive. —DOOLY V. HANOVER FIRE INS. CO., Wash., 47 Pac. Rep. 507.

95. INSURANCE—Oral Contract.—To establish an oral contract of insurance, binding on the company before the issuance of a policy, no higher degree of proof is required than on any other question of fact submitted to a jury.—WALDRON V. HOME MUT. INS. CO., Wash., 47 Pac. Rep. 425.

96. INSURANCE COMPANIES—What Constitute.—An association which contracts with its members, for a specified annual sum, to repair bicycles in case of an accident, and to replace those destroyed by accident or stolen, but not to pay any money, is not an insurance company, which must be chartered under Act May 1, 1876 (P. L. 53), but may lawfully do business under General Corporation Act 1874, § 2, which permits incorporation for "the maintenance of a society for protective purposes to its members from funds collected therein." — COMMONWEALTH V. PROVIDENT BICYCLE ASSN., Penn., 36 Atl. Rep. 197.

97. INTOXICATING LIQUORS—Criminal Prosecution.—On a prosecution for maintaining a liquor nuisance, an instruction that defendant could be convicted if she participated, co-operated, or was interested in maintaining the nuisance, was not erroneous, where there was no claim that defendant was acting as a servant, and the context showed that the court had reference to an interest, participation, and co-operation as joint proprietor.—COMMONWEALTH V. BURNS, Mass., 45 N. E. Rep. 755.

98. INTOXICATING LIQUORS—Unlawful Sale.—A compound of several ingredients, or a mixture of liquors, is an intoxicating liquor within the meaning of the prohibitory liquor law, when such compound or mixture may be taken in sufficient quantity to produce intoxication, and when it is reasonable to presume that

it may be used as a beverage, and as a substitute for the ordinary drinks.—STATE v. REYNOLDS, Kan., 47 Pac. Rep. 573.

99. JOINT TORT-FEASORS — Fraudulent Representations.—A vendor who gives a false receipt, purporting to be in payment of half the price of land, to enable the vendee, through it, to sell the land for double the actual price, is a joint wrongdoer with the vendee, and is responsible for the consequences of, though he receives no benefit from the fraud.—STONEY CREEK WOOLEN CO. v. SMALLEY, Mich., 69 N. W. Rep. 722.

100. JUDGMENT—Assignment.—By an assignment of a judgment, although without recourse, the assignor warrants that the judgment is what it purports to be, that he has done nothing to prevent the assignee from collecting it, and that it has not been paid; but, being without recourse, he is not answerable for the insolvency of the judgment debtor.—FINDLEY v. SMITH, W. Va., 26 S. E. Rep. 370.

101. JUDGMENT — Collateral Attack.—Where the validity of an order for the sale of lands made by the orphans' court is challenged in a collateral proceeding, that court will be presumed to have had before it, and to have passed upon, all those matters the existence of which was necessary in order to authorize the making of such order.—CLARK v. COSTELLO, N. J., 36 Atl. Rep. 271.

102. JUDGMENT—Failure to Enter.—Rev. St. 1894, § 594 (Rev. St. 1881, § 585), providing that every clerk who neglects to enter any judgment in the order book and judgment book shall be liable to any person injured to the extent of the damage sustained thereby, gives a right of action to a *bona fide* purchaser of real estate, which was subject to a judgment not entered in the judgment docket.—JOHNSON v. SCHLOSSER, Ind., 45 N. E. Rep. 702.

103. JUDGMENT—Foreign Judgment—Presumptions.—It will be presumed, in the absence of evidence to the contrary, in favor of courts of general jurisdiction of sister States, that they have the authority they assume to exercise, and that the modes of procedure by them, though different from that established by the laws of this State, are authorized by the laws of the State in which they act.—WESTERVELT v. JONES, Kan., 47 Pac. Rep. 322.

104. JUDGMENT—Injunction.—Equity will not enjoin proceedings based on a judgment rendered in an action at law, or interfere with the judgment, where it appears that complainant had his day in court and made a defense to the action; that he has appealed from the judgment, and seeks a review of the supposed errors averred as grounds for equitable relief; and that a bond was given, which stayed proceedings pending the appeal. — CHAPPELL, ETC. CO. v. SULPHUR MINES CO., Md., 36 Atl. Rep. 260.

106. JUDGMENT—Necessity of Findings.—A judgment that is not based on a finding, either general or special, is erroneous, though not, for that reason void.—MARYOTT v. GARDNER, Neb., 69 N. W. Rep. 837.

105. JUDGMENT — Subrogation.—One who obtains a judgment against a garnishee, based on the latter's indebtedness to the principal debtor on another judgment, cannot of his own volition, and without attempting to levy execution on the judgment recovered in the garnishment proceedings, substitute himself as use plaintiff in the judgment which his debtor holds against the garnishee, and issue process for its revival and collection.—WHERRY v. WHERRY, Penn., 36 Atl. Rep. 165.

107. JUDGMENT—Validity—Joint Defendants.—A judgment for plaintiff, in a suit against husband and wife on their joint note, is valid as to the wife, who, after appearing and filing an answer, withdrew the same, and made no further defense, though invalid as to the husband, who was not served.—KELLOGG v. WINDOW, Iowa, 69 N. W. Rep. 875.

108. JUDGMENT OF SISTER STATE—Res Judicata.—A judgment rendered by a court of another State, having jurisdiction of the parties and the subject-matter, may be pleaded as a bar to the further prosecution of an action for the same cause in this State, notwithstanding the latter action was pending prior to the rendition of such judgment.—UNION PAC. RY. CO. v. BAKER, Kan., 47 Pac. Rep. 563.

109. LANDLORD AND TENANT—Lease—Covenant to Repair.—An express agreement of a lessee to keep in good repair leased premises, and, at the end of the expiration of the terms, surrender their possession in as good condition as they were when he entered, natural decay, wear, and tear excepted, is not, and does not include, a covenant to rebuild buildings destroyed without his fault.—WATTLES v. SOUTH OMAHA ICE & COAL CO., Neb., 69 N. W. Rep. 785.

110. LANDLORD AND TENANT—Lease — Waiver of Conditions. — Where rent is payable in monthly installments, a condition that all the rent reserved in the lease shall be immediately due and payable on default or failure of the tenant for five days to pay any of the monthly installments is not waived by the acceptance by the lessor of overdue rent. — TEUFEL v. ROWAN Penn., 36 Atl. Rep. 224.

111. LANDLORD AND TENANT — Removal — Fixtures.—Where a tenant during the term, and at his own expense, lays a tile floor in the demised building, he may, before the expiration of the lease, remove the tile floor, and restore the building to its original condition.—ROSS v. CAMPBELL, Colo., 47 Pac. Rep. 465.

112. LANDLORD AND TENANT — Rent — Defenses. — A lessee, who entered leased premises as a subtenant, and afterwards took a new lease from the landlord, with a knowledge of a permanent servitude on the premises in the form of a railroad viaduct, is liable for the full rent reserved, even though, for a part of the term, he was deprived of the benefits of a part of the premises by reason of the railroad making repairs on the viaduct as an incident of the easement.—FRIEND v. OIL WELL SUPPLY CO., Penn., 36 Atl. Rep. 219.

113. LANDLORD AND TENANT — Surrender of Lease—Possession.—A lessee of a store notified his landlord that he had sold his stock of goods to S, that the lease was surrendered, and that he must look to S thereafter for his rent. S disclaimed any interest in the goods, as did the lessee. Both refused to take them away, and left them in the store. The store was locked up, and the key left at a local bank, and the landlord kept watch over the store to see that it was properly fastened: Held, that there was a change of possession of the goods from the lessee to the landlord. — SCHNEIDER v. STONE, Mich., 69 N. W. Rep. 829.

114. LANDLORD AND TENANT—Termination of Lease.—Under a lease for 15 years, "unless sooner terminated by the (lessors) as hereinafter provided for," which provides that, between the 1st and 31st of December of the tenth year, the lessors can give notice to the lessee that it is their "desire to terminate the lease and repossess the farm," and that arbitrators shall thereupon be chosen "to inquire and determine what damages, if any, shall be paid by one of the parties hereto to the other in consideration of the termination of this lease at the time," the arbitration is not a condition precedent, and the notice is effective to terminate the lease.—SMITH v. RASIN, Md., 36 Atl. Rep. 261.

115. LIBEL—Evidence.—In an action for libel against a newspaper corporation, it was proper to admit evidence of declarations of an agent of the corporation, made some time after the publication, when plaintiff demanded a retraction, as against an objection that it was not part of the *res gestæ*, since it was admissible on other grounds.—O'TOOLE v. POST PRINTING & PUBLISHING CO., Penn., 36 Atl. Rep. 288.

116. LIBEL — Privileged Communications. — A definition of a qualifiedly privileged communication, especially applicable to the facts of the present case, is as follows: Where a person is so situated that it becomes right, in the interest of society, that he should tell to a third person certain facts, then, if he *bona fide*,

and without malice, does tell them, it is a privileged communication. — COOGLER v. RHODES, Fla., 21 South. Rep. 110.

117. LIENS—Priority—Res Judicata.—A decree by default in a proceeding to foreclose a drainage lien does not estop a defendant therein who is a holder of a senior lien for taxes to foreclose it, it not appearing that the complaint in the drainage lien foreclosure proceeding in any way asserted superiority of such lien to that of such defendant. — ALLEN v. RICE, Ind., 45 N. E. Rep. 800.

118. LIEN—Supplies for Corporation.—The rights of a seller under a contract by which he retains the ownership of the article sold until payment is made are enforceable only at law, and a court of equity has no jurisdiction to enforce such rights under a bill claiming a statutory lien on other property of the purchaser, to which the complainant is not entitled; and, on an adverse determination of his right to equitable relief, the bill will be dismissed, though no objection for want of jurisdiction was taken by demurrer.—BOSTON BLOWER CO. v. CARMAN LUMBER CO., Va., 26 S. E. Rep. 390.

119. LIFE INSURANCE — By-Laws of Association.—Under St. 1890, ch. 421, § 21, relating to life associations, and providing that all policies or certificates which contain reference to the constitution or by-laws of the association as forming part of the contract shall also have attached thereto a correct copy of such by-laws, etc., a provision in a policy that "the member agrees to be bound by the by-laws of this association, now in force," etc., does not render the policy subject to a by-law not contained therein or attached thereto.—BOYDEN v. MASSACHUSETTS MASONIC LIFE ASSN., Mass., 45 N. E. Rep. 735.

120. LIFE INSURANCE—Proofs of Death.—While it has been held that misstatements in proofs of death are conclusive of the facts therein contained as against the claimant, unless before the trial the insurer has been furnished with a corrected statement, the strictness of this rule has been relaxed so that it now only applies where the insurer has been prejudiced in his defense by relying on the statements contained in the proof. — EMPLOYERS' LIABILITY ASSUR. CORP. v. ANDERSON, Kan., 47 Pac. Rep. 331.

121. LIMITATIONS — Demand. — Prescription only begins to run, in favor of the father who has received money for his daughter, from the time demand has been made for the same, or from the date of settlement between them, showing balance due. — O'NEILL v. LIENICKE, La., 21 South. Rep. 113.

122. LIMITATIONS—Running of Statute.—Section 5147, Gen. St. 1894, construed, and: Held, that the disability which will arrest the running of the statute of limitations must exist at the time the cause of action accrues. If the statute once begins to run against a party, it so continues until the bar is complete. No subsequent disability, pot even insanity, will impede it.—KELLY v. GALLUP, Minn., 69 N. W. Rep. 812.

123. MALICIOUS PROSECUTION—Burden of Proof.—In an action for malicious prosecution, the burden of proving that the prosecution was malicious is upon the plaintiff. If want of probable cause is shown, malice may be inferred; but the jury are not bound to so infer it. Want of probable cause and malice are both necessary to sustain an action, and both must be sustained by affirmative proof.—WRIGHT v. HAYTER, Kan., 47 Pac. Rep. 546.

124. MALICIOUS PROSECUTION—Probable Cause.—The fact that a lessee alters a lease already executed by the lessor, and, after signing the same, delivers it to the lessor's agent with the intention of misleading him, and through him the lessor, does not furnish the lessor and his agent probable cause for charging the lessee with forgery.—GAERTNER v. HEYL, Penn., 36 Atl. Rep. 146.

125. MANDAMUS — Canvassers. — Where the board of county commissioners, acting as canvassers, have failed to discharge their duty in a given case within the time limited by statute, they may, in relation to it, do voluntarily whatever they might be compelled to do by *mandamus*.—HEFFNER v. BOARD OF COM'RS OF SNOHOMISH COUNTY, Wash., 47 Pac. Rep. 430.

126. MASTER AND SERVANT—Fellow-servant.—A foreman having charge of, and personally assisting, a gang of laborers employed on one of several buildings being erected by, and under the supervision of, a general contractor, is a fellow-servant with such laborers.—COULSON v. LEONARD, U. S. C. C., E. D. (Penn.), 77 Fed. Rep. 539.

127. MASTER AND SERVANT—Independent Contractor. —A person employed to construct a building, with materials to be furnished by the owner, and according to certain plans, who was to receive in payment a *per diem* for himself and the other men engaged on the work, who were to be hired and paid by him, is an independent contractor, and occupies the relation of master to such employees, for whose negligence the owner is not liable; the work contracted for being lawful.—EMMERSON v. FAY, Va., 26 S. E. Rep. 386.

128. MASTER AND SERVANT — Minor Employees — Machinery. — In an action for injuries while performing work more hazardous than that for which a minor was employed, an instruction that defendant was liable if he put plaintiff at more hazardous work than that for which he was employed without explaining the dangers incident thereto, without limiting it to those dangers of which the master knew, or had reason to believe, plaintiff was ignorant, and which were not so obvious as that, with care, they could have been known to plaintiff, is erroneous.—NEWBURY v. GETCHELL & MARTIN LUMBER & MANUFACTURING CO., Iowa, 69 N. W. Rep. 743.

129. MASTER AND SERVANT — Negligence — Contributory Negligence. — Freedom from contributory negligence is not sufficiently shown to allow a recovery for the death of a section hand of defendant railway company caused by his being struck by a train, where there is no evidence as to what deceased was doing when struck by the train, or whether he looked or listened, or heard the approaching train in time to have avoided it.—FISHER v. LOUISVILLE, N. A. & C. RY. CO., Ind., 45 N. E. Rep. 689.

130. MASTER AND SERVANT — Personal Injury.—When one who is known to be an inexperienced person is put to work upon dangerous machinery, the employer is bound to give him such instructions as will cause him to fully understand the danger attending the employment, and the necessity for care.—VERDELLI v. GRAY'S HARBOR COMMERCIAL CO., Cal., 47 Pac. Rep. 364.

131. MASTER AND SERVANT — Risks of Employment.—A field superintendent of a natural gas company, whose duty it is to supervise the testing of wells, cannot recover for injuries caused by the explosion of a valve on a fitting which he himself selected from the company's stock, and adjusted for the test, whether the explosion was due to the lightness of the fitting, or to some defect which a proper examination could not have detected. — TOOHEY v. EQUITABLE GAS CO., Penn., 36 Atl. Rep. 314.

132. MECHANICS' LIENS—Attachment.—The enforcement of a mechanic's lien is not obnoxious to the policy of the insolvent law, although the attachment may be within four months of the filing of the petition in insolvency.—LAUGHLIN v. REED, Me., 36 Atl. Rep. 131.

133. MECHANIC'S LIEN—Orders Given by Contractor.—The provision of the supplemental mechanic's lien law that payments made by an owner on a building contract in advance of the terms of the contract shall be no defense to the claim of a subcontractor who serves a "stop notice," under the statute, does not abridge the right of the contractor to make an equitable assignment to a subcontractor of money to become due under his contract, by giving him an order on the owner; and, the owner being bound to recognize such equitable assignment, the payment of the order in advance of the terms of the contract is immaterial to another

subcontractor serving a notice, and cannot avail him to hold the owner to a liability beyond his contract.—BINNS v. SLINGERLAND, N. J., 36 Atl. Rep. 277.

134. MECHANIC'S LIEN—Sufficiency of Statement.—A mechanic's lien claim, which states in general terms that the conditions of the contract were the furnishing of materials and labor by plaintiff, and the payment of a specified sum by the owner on completion and acceptance of the building, is sufficient.—BRANHAM v. NYE, Colo., 47 Pac. Rep. 402.

135. MINES—Taking of Ore by Trespasser.—Under the rule that, when a trespasser by mistake enters on a vein to which he has no title, and takes ore from it, he may limit the owner's recovery, in an action for the ore taken, by showing the value of the ore taken and the actual cost of digging that particular ore from that particular vein, tramming it to the shaft, and hoisting it to the surface, the *bona fides* of the trespasser, the value of the ore, and the actual cost of its extraction, are questions for the jury, though defendant's evidence is uncontradicted.—ST. CLAIR v. CASH GOLD MINING & MILLING CO., Colo., 47 Pac. Rep. 166.

136. MORTGAGES — After-acquired Property.—Where chattels are sold under an agreement that the title shall not pass until full payment, and are delivered to the purchaser after he has made a mortgage covering after-acquired property, of which mortgage the vendor has constructive notice through its record, the vendor's lien on such chattels for their price will prevail, as against the mortgagee, provided such chattels are separate and distinct personalty, and do not become part of the real estate mortgaged, but if, with the consent of the vendor, implied by his knowledge of the mortgage, such chattels become a part of the realty, they are subject to the lien of the mortgage.—NEW YORK SECURITY & TRUST CO. v. CAPITAL RY. CO., U. S. C. C., D. (Ky.), 77 Fed. Rep. 529.

137. MORTGAGE—Assignment—Payment by Volunteer.—The rule of equitable assignment is never applied in aid of a mere volunteer, nor where it will operate as an injustice to the creditor.—BARTHOLOMEW v. FIRST NAT. BANK, Kan., 47 Pac. Rep. 519.

138. MORTGAGE—Foreclosure. — It is the duty of a trustee, in making sale of mortgaged property under a decree, to exercise sound discretion as to whether it shall be offered in parcels or as an entirety; and where the evidence is conflicting his discretion will not be overruled.—HUGHES v. RIGGS, Md., 36 Atl. Rep. 269.

139. MORTGAGES — Lien—Release.—Where lands are mortgaged to secure a debt, and a part of said lands are subsequently sold and conveyed by the mortgagor, the portion remaining unsold is primarily liable under the mortgage. A release subsequently given by the mortgagee to the mortgagor of the part unsold, without the assent or agreement of the purchaser, will not prejudice the rights of such purchaser of the part which was sold, if the mortgagee gave such release with knowledge of the rights and equities of the purchaser. If the part released is sufficient to satisfy the entire debt, the mortgagee cannot resort to the part which has been sold, but such release operates as a discharge of the lien to the extent of the value of the land released.—ELLIS v. FAIRBANKS, Fla., 21 South. Rep. 107.

140. MORTGAGE—Payment.—Where the amounts paid by a mortgagor to a building and loan association as interest and dues were equal to the amount which the mortgage was given to secure, a complaint for foreclosure will not be sustained.—INTERSTATE SAVINGS & LOAN ASSN. v. CAIRNS, Wash., 47 Pac. Rep. 509.

141. MORTGAGE—Subrogation — Purchase of Incumbrance.—As a general rule, any person having an interest in property subject to an incumbrance which may defeat or impair his title, has a right to disengage the property by payment of the incumbrance; and when he does so, if the debt is not one for which he is personally liable, he is entitled to be subrogated to the rights of the incumbrancer against the property; and subrogation arises by operation of law whenever a mortgage debt is extinguished by one entitled to redeem, other than the mortgagor or person ultimately liable for the mortgage debt.—JOYCE v. DAUNTZ, Ohio, 45 N. E. Rep. 900.

142. MUNICIPAL CORPORATIONS—Assessments for Improvements.—Where a city expressly covenants, in reference to providing a fund for the payment of certain street grade warrants, that it "will prosecute the business of levying and collecting such special tax or assessment without any delay whatever in any part of the proceedings, and in the shortest time possible under its charter and ordinances relating thereto," the city, and not the contractors, must look after the assessment and enforce its collection.—MCEWAN v. CITY OF SPOKANE, Wash., 47 Pac. Rep. 433.

143. MUNICIPAL CORPORATIONS — Defective Sewers—Damages.—Plaintiff cannot recover against a city for injuryito his houses caused by the setback of sewage through the alleged negligence of the city, where he connected his houses with the sewer in such a way as to be in violation of city ordinances.—BREUCK v. CITY OF HOLYOKE, Mass., 45 N. E. Rep. 732.

144. MUNICIPAL CORPORATIONS—Defective Sidewalk.—Municipalities are simply required to keep streets and sidewalks in a reasonably safe condition for persons traveling in the usual modes, by day and night, and exercising ordinary care.—WAGGENER v. TOWN OF POINT PLEASANT, W. Va., 26 S. E. Rep. 352.

145. MUNICIPAL CORPORATIONS — Defective Streets—Negligence.—It is a question for the jury whether a town was negligent in failing to protect, with a barrier, an excavation in the sidewalk from two to eight feet from the curb line (the sidewalk being only slightly above the street, and without curbing), so as to render it liable for injuries to persons driving on the street caused by the horses becoming frightened and backing into the excavation.—TISDALE v. TOWN OF BRIDGEWATER, Mass., 45 N. E. Rep. 730.

146. MUNICIPAL CORPORATION—Delaying Collection of Assessments.—A contract for street improvement provided that the contractor should make no claim against the city in any event except for the collection of the special assessments, and that the city would not be liable in any event because of their invalidity, or failure to collect the same. After the work was done, the city council, by resolution directed all proceedings for the collection of the assessment stayed, and the assessment was not collected for at least one year after it should have been collected: Held, that the contractor was not entitled to collect from the city interest on the assessments for the time their collection was delayed, under the statute providing for interest where money is withheld by an unreasonable and vexatious delay of payment.—VIDER v. CITY OF CHICAGO, Ill., 45 N. E. Rep. 721.

147. MUNICIPAL CORPORATION—Liability for Negligence.—A city is liable for injury caused by negligence of one engaged in excavating for its waterworks, though the work was being done by direct employment of day labor, under supervision of the city engineer, when, under Hill's Code, § 649, it should have been by contract, the expenditure required exceeding $500.—COLLENSWORTH v. CITY OF NEW WHATCOM, Wash., 47 Pac. Rep. 439.

148. MUNICIPAL CORPORATION—Negligence—Evidence.—In a suit against a municipal corporation for damages alleged to have been sustained by plaintiff falling into an unguarded excavation in a lot fronting on a street, a correct plan or drawing of the excavation and the surrounding locality is competent evidence.—VILLAGE ON CULBERTSON v. HOLLIDAY, Neb., 69 N. W. Rep. 853.

149. MUNICIPAL CORPORATIONS—Public Improvement—Validity of Special Tax.—Under Rev. St. 1879, § 4784, declaring that a duly authenticated special tax bill, issued in payment for street improvements, shall be *prima facie* evidence of the validity of the bill, of the

doing of the work, and of the liability of the property to the charge, a special tax bill, issued in payment for street paving, with proof of the signature of the city engineer who issued it, places upon the owner of the property charged thereby the burden of proving its invalidity.—BARBER ASPHALT PAV. CO. v. ULLMAN, Mo., 36 S. W. Rep. 458.

150. MUNICIPAL CORPORATIONS—Rules.—Rules for the government of a city council are of the dignity and effect of an ordinance where they are reported in writing by a committee appointed to draft them, and adopted on verbal motion at a regular meeting of the council.—STATE v. SWINDELL, Ind., 45 N. E. Rep. 700.

151. MUNICIPAL CORPORATIONS — Streets — Changing Grade.—In the absence of statute, a municipality is not liable for damages to abutting property owners caused by a change in the grade of a street.—WALISH v. CITY OF MILWAUKEE, Wis., 69 N. W. Rep. 818.

152. MUNICIPAL CORPORATION — Street Grade—Damages.—The measure of damages for injury to property from change of a street grade line is that sum which will make the owner whole; that is, the diminution of the market value from the change. If the market value is as much immediately after as immediately before the change, no damages can be recovered.—BLAIR v. CITY OF CHARLESTON, W. Va., 26 S. E. Rep. 341.

153. MUNICIPAL CORPORATION—Street Railways—Enjoining Track Laying.—A city cannot sue to enjoin a street railway company from laying its tracks upon a street, on the ground that the non-user by the company for five years of its franchise to lay tracks constituted a forfeiture of such right, as such a suit would be, in effect, for the forfeiture of a franchise, which can only be brought in the name of the State.—MILWAUKEE ELECTRIC RAILWAY & LIGHT CO. v. CITY OF MILWAUKEE, Wis., 69 N. W. Rep. 794.

154. MUNICIPAL CORPORATION—Vacation of Streets.—The only persons who can complain of the vacation of a street in whole or in part are the owners and occupants of lands adjoining, or through which runs, that part of the street which it is proposed to vacate.—SYMONS v. CITY AND COUNTY OF SAN FRANCISCO, Cal., 47 Pac. Rep. 453.

155. MUNICIPAL TAX—Goods in Original Packages.—The proof is that plaintiffs are importers; that they sold the goods in the original packages, but had not collected the proceeds of the sale. The defendant sought to collect a municipal tax upon these goods. Sales by the importer are held to be exempt from State taxation. The importer, by paying duty, acquires a right to dispose of the merchandise as well as to bring it into the country. The tax claimed would have the effect of intercepting the import *in transitu*, to become incorporated with the general mass of the property, and would prevent it from becoming so incorporated until it should have contributed to the revenue of the State.—GELPI v. SCHENCK, La., 21 South. Rep. 115.

156. NEGLIGENCE—Building—Negligent Destruction.—A joint action may be sustained by the owner of a building and an insurance company who has paid a loss thereon against defendant for having negligently set fire to the building, though the joint plaintiffs sue to recover, not only the value of the building in excess of the policy, but damages to the owner's business, proximately caused by defendant's negligence.—FAIRBANKS v. SAN FRANCISCO & N. P. RY. CO., Cal., 47 Pac. Rep. 451.

157. NEGLIGENCE—Electric Wires—Contributory Negligence.—A policeman on duty, who, on a rainy night, attempts to remove with his mace, from a street on his beat, a broken wire hanging from a pole, knowing it to be charged with electricity, is not necessarily guilty of contributory negligence.—DILLON v. ALLEGHENY COUNTY LIGHT CO., Penn., 36 Atl. Rep. 164.

158. NEGLIGENCE—Pleading.—In action for damages resulting from acts of another, alleged to have been negligent, the complaint is not demurrable, as not stating a cause of action, unless the particular acts alleged are such that they could not be negligent under any evidence admissible under the allegations of the pleading.—STENDAL v. BOYD, Minn., 69 N. W. Rep. 809.

159. NEGLIGENCE—Respondeat Superior—Damages.—In determining whether the doctrine of *respondeat superior* applies, the test is whether, with reference to the matter out of which the alleged wrong sprung, the person sought to be charged had the right, under the contract of employment, to control, in the given particular complained of, the action of the person doing the wrong.—GAHAGAN v. AEROMETER CO., Minn., 69 N. W. Rep. 914.

160. NEGLIGENCE — Volunteer — Contributory Negligence.—One who goes on a roof, at the request of a tenant in the building, to do gratuitously work which the tenant has the right to do on the roof, is not a volunteer, and therefore the owner is liable to her for injuries caused by neglect to repair the roof.—WILCOX v. ZANE, Mass., 45 N. E. Rep. 923.

161. PARTNERSHIP — Accounting.—A private stipulation of a partner, whereby he procures a partnership contract to be canceled, and a new one, on like terms, to be made to him individually, accrues to the benefit of the partnership; and such partner must account to his copartner for his share of the profits realized under the new contract.—SPEARS v. WILLIS, N. Y., 45 N. E. Rep. 849.

162. PARTNERSHIP — Fraud by Partners.—Defendant, a member of a partnership operating a gas well, negotiated a sale of the gas to R for one-half the gross proceeds. This offer he concealed, and by means of fraudulent representations made by himself and his agent, that one-fourth of the net proceeds was the best price obtainable, secured from his copartners a contract of sale at that price, in blank. In the contract he inserted his own and his agent's names, and immediately resold it to R in accordance with his offer: Held, that defendant and his agent were jointly liable in equity to account to the other members of the partnership for the profits of the sale to R.—ZAHN v. MCMILLIN, Penn., 36 Atl. Rep. 188.

163. PARTNERSHIP—Partnership Debt — Judgment on Note.—A promissory note, signed by all the members of a copartnership, when given for a consideration received by the firm, is as effectual to create a partnership debt as if signed in the firm name.—MEIER v. FIRST NAT. BANK OF CARDINGTON, Ohio, 45 N. E. Rep. 907.

164. PLEADING—Complaint—Measure of Damages.—A complaint for fraud in failing to furnish money according to promise states no facts from which damages can be measured, where it omits to state the rate of interest defendant was to receive and what plaintiff could have procured money for in the market, since the difference is the measure of damage.—SMITH v. PARKER, Ind., 45 N. E. Rep. 770.

165. PLEADING—Fraud — Mistake.—Where, in an action for the price of land, the defense is fraudulent representations on the part of the seller, an instruction submitting the defense of mutual mistake is erroneous.—BRAUNSCHWEIGER v. WAITS, Penn., 36 Atl. Rep. 155.

166. PLEADING—Recovery of Money.—Where a person sues to recover money lost at gambling, stolen, or for which *indebitatus assumpsit* would lie at common law, either phrase is sufficient in the summons to describe the cause of action.—O'CONNOR v. DILS, W. Va., 26 S. E. Rep. 354.

167. PRINCIPAL AND AGENT — Authority of Agent.—A long course of dealing by an agent for his principal, during which his acts had never in any manner been repudiated by the latter, held to raise a presumption that the agent had actual authority to do what was done by him in line with such course of dealing.—WHEELER v. BENTON, Minn., 69 N. W. Rep. 927.

168. PRINCIPAL AND AGENT—Powers — Partnership.—A co-owner in and agent for a syndicate for the purchase of land has not implied authority to select a

trustee to take title and to authorize the trustee to execute for the syndicate notes and deed of trust to secure the purchase price.—FERGUSON v. GOOCH, Va., 26 S. E. Rep. 397.

169. PRINCIPAL AND SURETY — Pleading — Variance.—Where two persons sign an obligation for the payment of money, and it is expressed in it that one signs as surety, and he annexes to his signature the word "surety," still both are bound jointly.—RILEY v. JARVIS, W. Va., 26 S. E. Rep. 366.

170. PRINCIPAL AND SURETY — Delivery.—One who signs a note as surety under an agreement that it shall not be delivered unless also signed by another, cannot be held by the payee who accepted the note with knowledge of the condition, and without the signature of the other surety.—DEERING HARVESTER CO. v. PEUGH, Ind., 45 N. E. Rep. 808.

171. PROCESS — Publication of Summons.—Under the statute, the office of a return of the sheriff that the defendant cannot be found is, not to authorize the publication, but to support it after it is made, being *prima facie* evidence that the case was one where service by publication was authorized, to-wit, where the defendant could not be found in the State.—EASTON v. CHILDS, Minn., 69 N. W. Rep. 903.

172. PROCESS — Service on Corporation — Validity.—Where there is an attempt at service reaching the defendant, but there is a defect in the manner of service or form of the return, this is a mere irregularity, and a judgment founded on such service is not open to collateral attack. But where the attempted service does not reach the defendant at all, a judgment founded thereon is absolutely void.—CAMPBELL, ETC. CO. v. MARDER, LUSE & CO., Neb., 69 N. W. Rep. 774.

173. PROHIBITION—When Lies.—An order continuing a part of an election contest of which the court has jurisdiction to another term, if erroneous, cannot be remedied by a writ of prohibition to the judge.—MOSS v. BARHAM, Va., 26 S. E. Rep. 388.

174. QUO WARRANTO — Charter.—An information for the purpose of having a charter forfeited on the ground of non-user or misuser of its franchise must be in the nature of a *quo warranto* brought by the attorney-general on behalf of the commonwealth, and cannot be prosecuted by private counsel on behalf of the inhabitants of a town.—KNOWLTON v. SHOMO, Mass., 45 N. E. Rep. 762.

175. RAILROAD COMPANY—Contributory Negligence.—The burden rests on a plaintiff, suing for injuries received by a person struck by a train at a railroad grade crossing, to show freedom from contributory negligence; and evidence that the person injured drove a horse on the crossing at a trot, without stopping to look or listen, it not being shown that he could not have seen or heard the approaching train had he done so, is insufficient.—CHASE v. MAINE CENT. R. R., Mass., 45 N. E. Rep. 911.

176. RAILROAD COMPANY — Crossing — Contributory Negligence.—Where a party with no defect in his sight or hearing attempts to cross a railroad track at a street crossing in a city, without looking or listening for the approach of a train, and is struck and injured by a train moving on said railroad, his negligence is such as to preclude him from recovering damages for such injury, although the servants of the railroad may have been negligent in failing to ring a bell or blow a whistle before reaching said crossing, as required by statute. — BERKELEY v. CHESAPEAKE & O. RY. CO., W. Va., 26 S. E. Rep. 349.

177. RAILROAD COMPANY — Crossings — Contributory Negligence. — A person who fails to stop, look, and listen for trains at a public crossing, relying on the duty and custom of the railroad company to ring bells when approaching such places, is not negligent *per se*.—PITTSBURG, ETC., RY. CO. v. LEWIS, Ky., 38 S. W. Rep. 482.

178. RAILROAD COMPANIES—Injury to Person on Track—Negligence. — A person on the track of a railroad company by the mere passive acquiescence of the company, or of his own wrongful act, can acquire no right of way thereon as against the company in its use of the tracks; and, when so on the track without right, a person injured there by the negligence of the company cannot complain, unless he himself was exercising extraordinary care at the time. — WABASH R. CO. v. JONES, Ill., 45 N. E. Rep. 813.

179. RAILROAD COMPANY — Negligence. — Defendant was negligent where, after its train had shunted some of the cars upon a siding by a flying switch, it continued on over a public crossing, and then ran backward over said crossing, with no brakeman at the rear, and no warning except the ringing of the bell at the other end, and collided with a vehicle. — COOKSON v. PITTSBURGH & W. RY. CO., Penn., 36 Atl. Rep. 194.

180. RAILROAD COMPANY — Street Railroad — Contributory Negligence. — A plaintiff who, after alighting from a street car going east, went behind the car, and while attempting to cross another track, three feet north of the one on which the car stood, was struck by a west-bound car and injured, there being no obstruction to prevent him from seeing the approaching car if he had looked, was guilty of contributory negligence precluding his recovery for the injury. — BALTIMORE TRACTION CO. v. HELMS, Md., 36 Atl. Rep. 119.

181. RAILROAD COMPANY — Street Railways — Negligence.—It is a question for the jury whether defendant street-railway company was negligent in running an electric car, the platform of which was crowded with passengers, at the rate of 15 miles an hour down grade and around a sharp curve. — REBER v. PITTSBURG & B. TRACTION CO., Penn., 36 Atl. Rep. 245.

182. RAILROAD COMPANY—Trespasser — Negligence.—A trespasser who was struck and injured by a train while sitting on the track of defendant's railroad in an intoxicated condition cannot recover for the injury without showing that those in charge of the train knew of his situation in time to have prevented it.—PRICE v. PHILADELPHIA, W. & B. R. CO., Md., 36 Atl. Rep. 263.

183. REAL ESTATE AGENT. — An agent employed to sell real estate, who also accepts employment from one contracting to purchase the property to induce his principal to accept certain other property in part payment, thereby vitiates both agencies, and cannot collect commissions under his contract with the first employer. — DEUTSCH v. BAXTER, Colo., 47 Pac. Rep. 405.

184. REAL ESTATE BROKERS — Recovery of Commissions.—A real estate broker cannot recover commissions for selling land, where he fails to prove either a completed sale or one negotiated on terms authorized by the owner.—HURD v. NEILSON, Iowa, 69 N. W. Rep. 867.

185. REMOVAL OF CAUSES — Diverse Citizenship.—Where the controversy, in a suit commenced in a State court, is between the complainant and one of the defendants, who are citizens of different States, the fact that there is another defendant, who is a citizen of the complainant's State, does not prevent the case from being removed to a federal court, where the interest of such co-defendant is identical with that of complainant. — HUTTON v. JOSEPH BANCROFT & SONS CO., U. S. C. C., D. (Del.), 77 Fed. Rep. 481.

186. REMOVAL OF CAUSES — Prejudice and Local Influence—Practice.—The better practice, upon applications for removal cases from State to federal courts, on the ground of prejudice or local influence, is to give notice to the opposite party, specifying the proofs to be used, and afford him an opportunity to present counter affidavits, if desired; and when this course is pursued, if not also when the application is *ex parte*, the sufficiency, as well as the truth or falsity, of the facts alleged, should be determined at a single hearing.—BONNER v. MEIKLE, U. S. C. C., D. (Nev.), 77 Fed. Rep. 485.

187. RES JUDICATA—Presumption.—Where the fundamental inquiry in a suit in equity was whether plaintiff or defendant owned certain bonds, and the bill was dismissed, but the decree did not show the grounds of dismissal, the presumption is that the issue was disposed of on its merits, and the question of ownership is therefore *res judicata*.—MARTIN V. EVANS, Md., 36 Atl. Rep. 258.

188. RES JUDICATA — Stipulation.—A decision on the merits as to a matter submitted on a rule is a bar to subsequent contest of the same matter either by another motion or by bill.—STRAW V. MURPHY, Penn., 36 Atl. Rep. 162.

189. REWARD.—A person who receives compensation from a water company for having reported a pollution of its source of supply, and the offender's identity, in compliance with the company's request for such information, cannot afterwards procure the offender's conviction, and for it claim a reward offered by the company "for the arrest and conviction" of such offenders, since the reward cannot be apportioned, and the acceptance of pay for the detection defeats a recovery for the conviction.—VAN HORN V. RICKS WATER CO., Cal., 47 Pac. Rep. 361.

190. SALE — Divisibility of Contract.—It cannot be urged against the divisibility of a contract for the purchase of a threshing outfit, consisting of several parts, that the consideration is stated at a gross sum, where it appears that this is the aggregate of the prices agreed upon as to the different parts.—AULTMAN & TAYLOR CO. V. LAWSON, Iowa, 69 N. W. Rep. 865.

191. SALE—Time for Payment.—A contract of sale of corn stated the price, and also the time and place of delivery, but did not provide specifically time, place, or manner of payment: Held, that delivery and payment were to be concurrent acts, and the vendor could insist on payment in cash or money, in the strict sense of the term "current funds."—BEHRENDS V. BEYSCHLAG, Neb., 69 N. W. Rep. 835.

192. SCHOOL DISTRICTS — Change of Boundaries—Legislative Powers.—A school district is but a subordinate agency of the territory, doing the work of the territory. It is a creature of the legislature. The legislature may create or abolish school districts, or it may change their boundaries without consulting the inhabitants. It may thus change their boundaries for any reason that may be satisfactory to it, and it may do this as well through a subordinate agency or officer as by direct legislative act.—SCHOOL DIST. V. ZEDIKER, Okla., 47 Pac. Rep. 482.

193. SCHOOLS — Teachers — Discharge.—Plaintiff entered into a written contract of employment as teacher with a school district for the term of three months, commencing at a stated time, with option to her to teach the school year if satisfaction was given. She taught under the contract the three months, exercised the option given her, and remained in the employ without objection another three months, when she was discharged without good or sufficient cause, before the close of the school year: Held, that the services rendered after the first three months were performed under said contract, and a new written contract was not necessary to bind the district for the entire school year.—WALLACE V. SCHOOL DIST., Neb., 69 N. W. Rep. 772.

194. SPECIFIC PERFORMANCE—Contracts Enforceable.—An antenuptial contract with a woman without means, who had been the man's housekeeper, provided for her support from his estate, by providing a home and such amount monthly, quarterly, or yearly as would "enable her to live in comfort, and equal to such as she has heretofore enjoyed, and, in case of sickness, such added amount as may be necessary for care, medical attendance, and other necessary expenditures," and at her death the expenses of the funeral and rites of burial: Held, not so uncertain and indefinite that it could not be specifically enforced.—THOMPSON V. TUCKER-OSBORN, Mich., 69 N. W. Rep. 730.

195. SPECIFIC PERFORMANCE — Contract for Sale of Land.—A purchaser is not entitled to the specific enforcement of a contract to convey land, after his default in making payments, which, by the terms of the contract, operated as a forfeiture of all his rights thereunder, without proof of a waiver of such provision by the vendor.—FOOT V. BUSH, Iowa, 69 N. W. Rep. 874.

196. SPECIFIC PERFORMANCE—Suit by Bondholders.—Defendants, the owners of all the stock in three partly completed railroads, contracted with N to consolidate the railroads, and to mortgage the franchises and property of the companies and certain land alleged to be owned by defendants, to secure bonds to be issued by the new company and negotiated by N. A deed of trust was made, purporting to comply with the contract, but by fraud other lands were substituted, which were valueless: Held, that on refusal of the trustee to sue for specific performance of the contract, or damages for its breach, a bondholder in behalf of himself and all other bondholders could sue therefor.—O'BEIRNE V. ALLEGHENY & K. R. CO., N. Y., 45 N. E. Rep. 873.

197. STATE—Action Against — Appointment of Commissioner.—Where a person is, by a special act of the legislature, appointed a commissioner to revise the general laws of the State, and report a compilation of them to the next legislature, and the act makes no provision for his compensation, he has no right of action against the State for the same.—HARRIS V. STATE, S. Dak., 69 N. W. Rep. 825.

198. STATUTES — Expression of Subject in Title.—Local Acts 1893, p. 1270, tit. 10, § 14, declaring that the city council of Lansing shall afford fire and police protection to State property and care for the streets, walks and sewers adjacent to such property, and that the State shall pay the city such sum as would, in the judgment of the city assessor, be lawfully assessable for like purposes against property generally in said city, violates Const. art. 4, § 20, in that no such object is expressed in its title, "An act to reincorporate the city of Lansing, and to repeal all acts and parts of acts in conflict therewith."—CITY OF LANSING V. BOARD OF STATE AUDITORS, Mich., 69 N. W. Rep. 728.

199. TAXATION—Exemptions.—Pub. St. ch. 11, § 5, cl. 6, exempting from taxation wearing apparel, farming utensils, and household furniture not exceeding $1,000 in value, and tools of a mechanic not exceeding $300 in value, is constitutional.—DAY V. CITY OF LAWRENCE, Mass., 45 N. E. Rep. 751.

200. TAXATIONS—Street Railways.—Under Laws 1895 ch. 368, § 6, imposing a license fee on street railways, and providing that it shall be in lieu of all other taxes and assessments, and "all" personal property, franchises, and real estate owned by such companies shall be exempt from assessment and taxation, and that all lands and lots unimproved or having buildings thereon shall be liable to taxation for State, county, and school purposes—all the property of such companies, whether used for railroad purposes or not, is exempt from assessments.—MILWAUKEE ELECTRIC RAILWAY & LIGHT CO. V. CITY OF MILWAUKEE, Wis., 69 N. W. Rep. 796.

201. TRIAL—Case Arrested — New Trial.—Where, on the trial of an action in a court of common pleas, the court upon the motion of the defendant, arrests the evidence of plaintiff from the jury, discharges the jury, and renders judgment for the defendant, the plaintiff may make such action of the court the subject of a motion for new trial.—WEAVER V. COLUMBUS, S. & H. V. RY. CO., Ohio, 45 N. E. Rep. 717.

202. TRIAL — Taking Case from Jury.—The court should not take a case from the jury on the evidence unless it is very clear, and, when he does so, he should specify the particular ground of his ruling.—HOWEY V. FISHER, Mich., 69 N. W. Rep. 741.

203. TRUSTS—Misappropriation by Trustee.—Where an agent misappropriates a fund of his principal by

gift the principal may recover the funds in the hands of the person receiving it as a gift, or in the hands of others to whom it is afterwards given.—OTIS v. OTIS, Mass., 45 N. E. Rep. 737.

204. TRUST—Resulting Trusts—Corporations—Stock.—The cashier of a bank used the bank's funds to purchase stock in another bank: Held, that a court of equity would charge the stock with a trust in favor of the bank whose funds were wrongfully used to purchase it.—TECUMSEH NAT. BANK v. RUSSELL, Neb., 69 N. W. Rep. 763.

205. VENDOR AND PURCHASER.—A parol agreement between the parties to an oil lease, as to what shall constitute due diligence or abandonment, is binding on purchasers from the lessor without notice, but with knowledge of the existence of the lease.—BARTLEY v. PHILLIPS, Penn., 36 Atl. Rep. 217.

206. VENDOR AND PURCHASER—Payment—Tender.—A purchaser of lots with knowledge that his vendor held them subject to a trust deed held by the original vendor, which was to be released lot by lot as a stipulated sum was paid on each, is not entitled to a decree compelling the original vendor to release the trust deed on the lots purchased, in the absence of proof of payment or unconditional tender of the due proportion of the debt secured.—SMITH v. BLACK, Colo., 47 Pac. Rep. 394.

207. WATERS—Appropriation.—The quantity of water appropriated, as well as the validity of the appropriation itself, must be determined by the purpose of the diversion and the use of the water diverted, and not by the mere fact of diversion.—SENIOR v. ANDERSON, Cal., 47 Pac. Rep. 454.

208. WATERS—Ownership of Lands Under the Great Lakes.—Title to and dominion over lands beneath the navigable waters of the great lakes are in the States, respectively, within whose boundaries such lands are located, each State holding the fee thereof in trust for the people for the purposes of navigation and fishing.—ATTORNEY-GENERAL v. KIRK, Ill., 45 N. E. Rep. 880.

209. WATERS AND WATER COURSES — Accretion. — Where a river gradually changes its course, wearing away part of a tract of land through which it runs, and the soil washed away in one locality is deposited by accretion in another, and after a complete change in the river course the land washed away is built up anew, the owners of the land to which it is attached by accretion will hold title, and not those who may have owned the original tract within the same lines.—PRICE v. HALLETT, Mo., 38 S. W. Rep. 451.

210. WATER RIGHT—Conveyance. — Where the proprietors of a water right, without proceeding in eminent domain, make an agreement whereby a landowner gives them permission to construct the ditch over his premises, in consideration of the use of sufficient water to irrigate that part of his land lying below the ditch, the water being essential to its proper cultivation, the landowner's interest in in the ditch becomes appurtenant to the land lying below the ditch, and hence passes with a conveyance of it, without being expressly described in the deed.—SLOAN v. CLANCY, Mont., 47 Pac. Rep. 334.

211. WILLS—Construction.—Testator gave his son R and daughter C the farm of 90 acres and all farming utensils and stock, in equal shares, and directed that "if my daughter C dies unmarried, her brother R shall have what remains of her share of my property, and if she marries, then her brother R shall pay her $1,000 as her share of my estate:" "Held, that the quoted words refer to a marrying or dying unmarried during testator's lifetime, and not after.—IN RE JACKSON'S ESTATE, Penn., 36 Atl. Rep. 156.

212. WILL — Construction.—A devise "to my son M, and to his children," vests in M only a life estate, and in his children living at the testator's death an estate in remainder, which will open to let in after born children of M.—CRAWFORD v. FOREST OIL CO., U. S. C. C., W. D. (Penn.), 77 Fed. Rep. 534.

213. WILLS—Contingent Remainders. — Testator directed that the residue of his estate should remain in the control of his executors and their successors until the decease of the last survivor of the life annuitants, and that then the said residue, with all accumulated interest, should be equally divided among his grandchildren so distributed, and to their heirs, executors, etc., forever: Held, that the grandchildren took a contingent remainder in such residue.—HALE v. HOBSON, Mass., 45 N. E. Rep. 913.

214. WILLS—Evidence.—A writing in form and substance, a will, executed by a person of testamentary capacity, without undue influence, and signed, sealed, and witnessed as and for the will of such person, can be set aside on the ground that he did not have a full understanding of its nature, and did not execute it for a will, only on a very clear evidence.—BOEHM v. GLOECKNER, Penn., 36 Atl. Rep. 226.

215. WILLS—Nature of Estate.—A testator, by his will, gave a farm to his son J. He then gave another farm to his second son, and other two farms to his wife, with the remainder to his third and fourth sons. He then provided that none of the farms given to his sons should be sold by them during the life of his wife, and that if any of his sons should die without leaving issue, but leaving a widow, the farm of such son should go to his widow, during her widowhood, and afterwards to the heirs at law of the testator: Held, that J took a vested estate in fee-simple in the farm devised to him, subject, however, to be divested by his death, during the life-time of his mother, without leaving issue, but leaving a widow: Held, further, that, by the death of the testator's wife during the life-time of J, the limitation over to the heirs of the testator was defeated, and the estate of J became indefeasible.—PATTERSON v. MADDEN, N. J., 36 Atl. Rep. 273.

216. WILLS—Nature of Estate.—One item in a will was: "I will and bequeath to my wife" land described, "also" certain personal property, "also $1,000 in money this to be hers during her natural life, and what is left at her death is to go to my heirs:" Held, that the widow took a life estate only in the land.—RUSK v. ZUCK, Ind., 45 N. E. Rep. 691.

217. WILLS—Probate—Charitable Trusts.—A will, appointing executors and directing the payment of funeral expenses, and the expenses of administration, is entitled to probate, though its other provisions creating a charitable trust are invalid.—IN RE JOHN'S WILL, Oreg., 47 Pac. Rep. 341.

218. WILL — Proof — Declarations of Testator. — The testimony of a witness as to the contents of a will, his knowledge being derived from testator's reading the will to him, and not from having himself inspected it, is in effect only testimony as to the testator's declarations.—CLARK v. TURNER, Neb., 69 N. W. Rep. 843.

219. WITNESSES—Privilege—Waiver.—The fact that a witness in a criminal trial has signed an affidavit indorsed on the information, presented and signed by the State's attorney, stating that the charges therein made are true, does not constitute a waiver by him of the right to claim his privilege of refusing to answer a question, on the ground that his answer will criminate him, or expose him to a penal liability.—SAMUEL v. PEOPLE, Ill., 45 N. E. Rep. 728.

220. WITNESS — Transactions with Decedent.—Plaintiffs' intestate was the holder of a certificate of deposit in a bank in which defendants' testator was a partner. After the death of defendants' testator, plaintiffs surrendered the certificate, taking in lieu thereof a new certificate: Held, that as plaintiffs, if they had knowledge of the fact that defendants' testator was a member of the partnership, would be liable for any loss occurring by reason of the exchange, they were interested parties, and as such incompetent to testify as to their knowledge of his membership. — POWELL v. DERICKSON, Penn., 36 Atl. Rep. 167.